(24,736)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 470.

C. E. GANNON, PLAINTIFF IN ERROR,

vs.

D. R. JOHNSTON AND WILBORN WOLFE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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a *Return to Writ.*

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and procedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court of the State of Oklahoma, at Oklahoma City, Oklahoma, this 30th day of April, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of the State of Oklahoma.

1 Filed Apr. 22, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

Case No. —.

C. E. GANNON, Plaintiff in Error,
vs.
D. R. JOHNSTON et al., Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to D. R. Johnston and Wilborn Wolfe, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein C. E. Gannon is Plaintiff in Error, and you, the said D. R. Johnston, and Wilborn Wolfe, are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Oklahoma, this 16 day of April, 1915.

[Seal Supreme Court, State of Oklahoma.]

MATTHEW J. KERREL,
Chief Justice.

Attest:
WM. M. FRANKLIN,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

2 STATE OF OKLAHOMA,
County of Marshall, ss:

We, the undersigned, Attorneys of Record for the Defendants in Error in the above entitled cause, hereby acknowledge service of the above citation.

Dated this 20th day of April, 1915.

JONES & GREEN,
KENNAMER & COAKLEY,
Attorneys for Defendants in Error.

Filed Apr. 22, 1915. William M. Franklin, Clerk.

3 Filed Apr. 14, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States, at Washington, D. C.

C. E. GANNON, Plaintiff in Error,
vs.
D. R. JOHNSTON et al., Defendants in Error.

Petition for Writ of Error.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States and the Associate Justices of said Court:

Now comes C. E. Gannon, Plaintiff in Error, who was Plaintiff in Error in the Supreme Court of the State of Oklahoma, and respectfully show- unto this Honorable Court, that on the 13th day of September 1911, there was filed in the District Court of Jefferson County, Oklahoma, by the Defendants in Error D. R. Johnston and Wilborn Wolfe, an amended petition wherein it was alleged "that they (Defendants in Error) are citizens of Oklahoma and that Wilborn Wolfe brings this suit as grantor and for the benefit of said plaintiff D. R. Johnston to protect his warranty of title made in the deed hereinafter described to said plaintiff D. R. Johnston. It was then alleged that on the 7th. day of October 1905 and the 27th. of October 1905 patents were issued to Agnes Wolfe who was a full blooded Chickasaw Indian, roll number 347, which patents granted to Agnes Wolfe as her allotment of the Choctaw-Chickasaw tribe of Indians, the following described land, to wit: N. E. /4 N. W. /4 and Lots 1 and 2 of sec. 30 and E. /2 N. W. /4 and E. 20 acres of Lot 1 and Lot of Sec. 31, Township 3 South, Range 7 West and that the legal title to said lands thereby vested in said Agnes Wolfe.

That thereafter, to wit in the year 1903, Agnes Wolfe Died in that portion of the Indian Territory now comprised in Pontotoc County, Oklahoma, leaving surviving her as sole heir at law, her brother Wilborn Wolfe.

That on the 4th. day of January, 1909, plaintiff Wilborn Wolfe conveyed said land by warranty deed to plaintiff D. R. Johnston;

that said deed was approved by the County Court of Pontotoc County, the court having jurisdiction of the estate of said
4 Agnes Wolfe, deceased, on the 23rd. day of March 1909 and said deed was also approved by the Secretary of Interior on the 2nd. day of July, 1910 and said deed was filed for record in the office of the Register of Deeds of Jefferson County, Oklahoma on the 25th. day of March, 1909 and the order of approval by the Coounty Court of Pontotoc was recorded in the office of the register of Deeds of Jefferson County, Oklahoma, and that by reason thereof the legal title to said land is vested in D. R. Johnston.

It was further alleged the defendant (Plaintiff in Error here) claims title to said premises adverse to the title of the plaintiff D. R. Johnston, the nature of which is as follows:—said defendant holds a deed to said premises, executed by Henry E. Wilson and Grace I. Wilson to said defendant dated November 30th. 1907, filed for record April 3rd. 1908, in the office of the Register of Deeds of Jefferson County, Oklahoma. That said claim of said defendant is without right as against this plaintiff and said defendant has no title, estate, right or interest in said premises or any part thereof.

That said pretended deed of said defendant is void and of no effect for the reason that said Henry E. Wilson and Grace I. Wilson had no right, title and interest in or to said land and could convey none for the reason that said Henry E. Wilson and Grace I. Wilson claims title through the Bankers Trust Company of Ardmore, which in turn claimed title from the Choctaw Investment Company, which in turn claimed title through A. J. Waldock who claimed title from Wilborn Wolfe, one of the plaintiffs herein, by reason of a deed dated October 13th. 1903, filed for record October 26th. 1903.

That said pretended deed from Wilborn Wolfe to A. J. Waldock is void and of no effect for the reason that the said lands, were, at the time said deed was executed, restricted, lands and said Wilborn Wolfe, under the laws of Congress then in force had no power at that time to make a valid conveyance of said lands, as the said Agnes Wolfe the deceased allottee was a full blood Chickasaw Indian and that the said Wilborn Wolfe was also a full blood Chickasaw Indian,
5 and the said deed to A. J. Waldock was void for the reason that the same had not been approved by the Secretary of the Interior or by any court of competent jurisdiction. That said deed to A. J. Waldock was void for the further reason that at the time of the execution of the same, patents had not been issued conveying the title of the Choctaw and Chickasaw Nations to Agnes Wolfe the allottee of said land. That said deed was void for the further reason that A. J. Waldock did not pay for the same the appraised value therefor as appraised b ythe Commission to the Five Civilized Tribes, as said deed was executed at a time when the Chickasaw and Choctaw Tribal Governments were in force, and that the consideration paid for said land by A. J. Waldock was unfair, unjust and disproportionate to the value of said land, and by reason thereof, the said deed from Wilborn Wolfe to A. J. Waldock is void.

It is then alleged that the various conveyances of record constitute a cloud on the title of D. R. Johnston.

It is then alleged that D. R. Johnston is the legal and equitable owner of said land; that the defendant C. E. Gannon is in the unlawful possession of said land and that by reason of the unlawful possession of said land by the defendant C. E. Gannon, the plaintiff D. R. Gannon had been damaged in the sum of $2,000.00.

The prayer of the amended petition is that the title of the plaintiff D. R. Johnston is valid and perfect and that the defendant C. E. Gannon decreed to have no title, claim or interest in said land and that C. E. Gannon be enjoined and restrained from claiming or asserting any right, title, claim or interest in or to said land adverse to that of D. R. Johnston; that plaintiff have judgment for rents and profits to the amount of $2,000.00 and $500.00 damages, for costs and all other relief, and also with a prayer that if the court find that the said D. R. Johnston was not in possession of said land, then the plaintiff Wilborn Wolfe prays for judgment and that the same inure to the benefit of D. R. Johnston.

To the amended petition, C. E. Gannon demurred and as grounds therefor, stated that the amended petition failed to state facts sufficient to constitute a cause of action in plaintiff of the plain-
6 tiffs and against the defendant, and the allegations and statements contained in said amended petition were insufficient to warrant the court in rendering judgment as prayed for in the said amended petition, which said demurrer was filed in the trial court on the 13th. day of September, 1911, which demurrer was overruled and to which ruling of the court, the said C. E. Gannon excepted, and that to wit on the 25th. day of September, 1911, C. E. Gannon filed his answer and cross petition, wherein, he denied all the allegations contained in the amended petition filed, and by way of cross petition, he alleged that the lands in controver-y were allotted to and in the name of Agnes Wolfe, a Chickasaw Indian and that patents therefor had been regularly issued as shown by exhibits "A" and "B" attached to said answer and cross petition, and it was then alleged that Agnes Wolfe died, leaving surviving her as her sole and only heir at law her brother Wilborn Wolfe, and that after the allotment aforesaid and after the death of the said Agnes Wolfe, the said Wilborn Wolfe executed, acknowledged and delivered to A. J. Waldock his warranty deed to said land, the consideration therefor being the sum of $1,050.00 as expressed in said deed, and attached a copy of said deed to his said answer and cross petition and had the same marked exhibit "C," and that the said A. J. Waldock immediately went into possession of said land; that afterwards and in October 1905, A. J. Waldock and his wife Ella Waldock conveyed said land to the Choctaw Investment Company, and attached to said answer and cross petition a copy of said deed and had the same marked exhibit "D," and that the Choctaw Investment Company immediately went into possession of said land; that afterwards, the Choctaw Investment Company conveyed said land to the Bankers Trust Company and attached to said answer and cross petition a copy of said deed and had the same marked exhibit "E"; that afterwards, the Bankers Trust Company conveyed said land to Henry E. Wilson and attached to said answer and cross petition a copy of said deed and had

the same marked exhibit "F" and that afterwards, the said Henry E. Wilson, joined by his wife Grace I. Wilson conveyed said land to the defendant C. E. Gannon, and attached to said answer and cross petition a copy of said deed and had the same marked
7 exhibit "G". That all of said deeds were regularly recorded in the office of the register of deeds wherein said land was situated, and that the said C. E. Gannon and his vendors had been in the exclusive and peaceable possession of said land since the fall of 1903, during all of which time, the said C. E. Gannon and his vendors had been receiving the rents and profits arising from said land; that he had been paying the taxes on said land.

It was then alleged that D. R. Johnston procured a deed from Wilborn Wolfe as of date the 4th day of January, 1909, which deed had been recorded and that for more than one year, the defendant C. E. Gannon had been in possession of said lands asserting title thereto, during which time, the said C. E. Gannon had been receiving the rents and profits from said land, to the exclusion of the plaintiffs, D. R. Johnston and Wilborn Wolfe, and by reason of which, the deed of the plaintiff D. R. Johnston was void, by reason of being in violation of the Champerty and maintenance statutes of the State of Oklahoma.

It was then alleged that the land purchased by A. J. Waldock from Wilborn Wolfe, the sole heir at law of Agnes Wolfe deceased, *were* purchased by him under sections 12 and 16 of the Supplemental Treaty, between the Chickasaw and Choctaw Nations and the Government of the United States ratified September 25th, 1902, and it was then alleged that by reason of the fact that a majority of the lawyers of the Indian Territory portion of the State of Oklahoma having construed such titles as the one claimed by C. E. Gannon to be alienable, and that by reason of such construction by the United States court prior to Statehood, the District Courts of the State of Oklahoma since statehood and the Supreme Court of the State of Oklahoma since statehood, $10,000,000.00 had been invested by farmers' loan companies within the state of Oklahoma and by loan companies outside of the state of Oklahoma, and by reason of which, a rule of property had been established, which construction by the lawyers, judges of the district courts of the state of Oklahoma, United States court prior to statehood and the supreme court of the state or Oklahoma had been accepted as the law for a period of 8 years.

8 The prayer of the answer and cross petition is, that the plaintiffs, D. R. Johnston and Wilborn Wolfe take nothing by their said amended petition, that the defendant C. E. Gannon have judgment quieting his title, and that the deed of Wilborn Wolfe to D. R. Johnston be cancelled as a cloud on the title of C. E. Gannon, and that D. R. Johnston and Wilborn Wolfe be enjoined and restrained from claiming or asserting any right, title, claim or interest in or to said land.

To the answer and cross petition of C. E. Gannon, Wilborn Wolfe and D. R. Johnston filed their reply, wherein they denied all the allegations contained in the answer and cross petition of C. E.

Gannon, and further alleged that at the time Wilborn Wolfe executed the deed to D. R. Johnston, the land was wild and unimproved and that no one used or occupied the same. It was further alleged that D. R. Johnston went upon said land prior to his purchase aforesaid and found the taxes unpaid and that he paid the taxes thereon, and that since the — day of March, 1909, C. E. Gannon had unlawfully entered upon said land and collected the rents and profits without the knowledge or consent and in violation of the rights of D. R. Johnston.

Upon the pleadings thus made, a trial was had, and the trial court of Jefferson County, Oklahoma, having been requested to make findings of fact and conclusions of law, and to wit on the 18th day of September 1912, filed in open court, the following findings of fact and conclusions of law, to wit. "That the land in controversy was allotted to one Agnes Wolfe on the — day of ——, 1903, the certificate of allotment bearing date of July 7th, 1903, the date of patent being signed by the last Governor to sign the same, being September 12th, 1905; date of approval by the Secretary of the Interior being October 7th, 1905.

2. The court further finds that Agnes Wolfe, the allottee died on the — day of ——, 1903. Letters of administration over the estate of the said allottee having been issued from the County Court of Pontotoc County, Oklahoma, on the 15th day of February, 1909.

3. The court further finds that on the 4th day of January, 1909, one Wilborn Wolfe, executed and delivered to D. R. Johnston, the plaintiff herein, warranty deed for the land in controversy. That said deed was approved by the County Judge of Pontotoc County, Oklahoma on March 23rd, 1909. That in the order of approval of said deed it is recited that Wilborn Wolfe was the brother and only heir of Agnes Wolfe, deceased allottee.

9 4. It is also admitted in the plaintiffs petition and in the answer of the defendant, that Wilborn Wolfe is the brother and only heir of the said Agnes Wolfe, and the court so finds that the said Wilborn Wolfe was the brother and only heir of said Anges Wolfe, deceased allottee.

5. The court further finds that said D. R. Johnston paid to the said Wilborn Wolfe, the sum of $— as consideration for the warranty deed from the said Wilborn Wolfe to the said D. R. Johnston.

6. The court further finds that the said Agnes Wolfe was a full blood Chickasaw Indian and that Wilborn Wolfe is a full blood Chickasaw Indian.

7. The court further finds that at no time since the execution of the deed to Johnston by the said Wilborn Wolfe, has the said Johnston been in control or possession of the land sued for.

8. The court further finds that on October 13th. 1903, for a consideration of $1050.00, said Wilborn Wolfe executed and delivered to one A. J. Waldock, a warranty deed for the land sued for in this action.

9. The Court further finds that on the 23rd. day of October, 1905, said A. J. Waldrock, executed and delivered to the Choctaw Investment Company, for a valuable consideration, a quit claim deed for

the lands sued for in this action and further finds that on the 27th. day of August 1906, said A. J. Waldock executed and delivered to the Choctaw Investment Company a warranty deed to said land sued for.

10. That court further finds that on July 23rd. 1906, the Choctaw Investment Company, for a good and sufficient consideration, executed and delivered to the Bankers Trust Company, a warranty deed for the lands sued for by the plaintiff herein; and that on the 22nd. day of October 1906, the Bankers Trust Company for a good and valuable consideration, executed and delivered a warranty deed for the lands sued for herein to one Henry E. Wilson and wife grantors of the defendant C. E. Gannon herein.

11. The court further finds that on November 30th. 1907, said Henry E. Wilson and wife, for a good and valuable consideration, executed and delivered to the defendant C. E. Gannon, warranty deed for the lands in controversy.

12. The court further finds that from the year 1908 said C. E. Gannon through his agents and tenants *have* been in possession and control of said premises, sued for, and *have* received the rents, revenues, profits and emoluments therefrom, execpt certain sums by reason of being in litigation accruing out of one lease held by one Addington, is held subject to such litigation.

13th. It is stipulated by the plaintiff and defendant herein that for a period of 8 years after the passage of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the Government of the United States, lands inherited under sections 12 and 16 of said Supplemental Treaty, were believed to be alienable by the heirs so inheriting the same whether such heirs were full blood Indians or otherwise, provided such heir died between September 25th, 1902, and April 26th, 1906. That large sums of money were loaned upon such lands and that there has been invested upon such lands under such titles sums approximating $10,000,000.00.

14th. It is further stipulated and agreed by and between the parties hereto, and the court so finds, that said rulings and contentions *was* had and upheld by the Bar of the Chickasaw and Choctaw Nations, by the Courts of the State of Oklahoma and of the United States Courts in and for the Indian Territory before statehood.

15. The court further finds that the plaintiff Johnston nor his grantors were in possession of the land in controversy at any time since the year 1903.

16th. The court further finds that during the year 1909 and 1910, there were in cultivation upon said premises, 65 acres of land. The evidence does not disclose nor does the court find whether such land was on that part of the allotment designated as a homestead or on that part of the allotment designated as a surplus.

17th. The court further finds that the reasonable rental value of said land during the year 1910 and 1911 was one dollar per acre, per annum.

Conclusions of Law.

1. The evidence in this case does not establish a rule of property which is a true adherence to the doctrine of stare decisis. In a proper

case for its application it is undoubtedly necessary to preserve certainty and uniformity and stability and symmetry of our jurisprudence. When the courts of last resort have announced principles affecting the acquisition of title to real estate, and the principals thus announced have been long established, frequently recognized and conformed to, and property rights have been acquired thereunder, such decisions should not and will not be overturned, although the principles announced therein might otherwise be questioned.

But there is no evidence offered nor does the stipulation filed admit that any court of last recort *have* upheld the contentions of the defendant herein, or that such a contentions had been held, save by practitioners of the East part of the State of Oklahoma, and the trial courts of that part of the State. The decisions of the districts courts of Oklahoma, from which no appeals were taken, cannot be regarded as establishing a rule of property.

2. Defendant holds the land in question under color of title. The court further finds that the grantee, Wilborn Wolfe is a necessary and proper party in this action, and may join with his grantee in the prosecution of such suit for the use and benefit of such grantee.

3. The court further concludes that that part of the allotment of Agnes Wolfe, designated as a "surplus" was inalienable at the time of the execution of the deed to A. J. Waldock.

4. The court finds that that part of the allotment of Agnes Wolfe, designated as a homestead, was alienable, without limitations and restrictions at the time of the execution of the deed by Wilborn Wolfe to A. J. Waldock.

5. The court further finds in this action that the plaintiff Wilborn Wolfe is entitled to recover for the use and benefit of the plaintiff Johnston that part of the land described as the "surplus" allotment of Agnes Wolfe deceased; that the defendant herein is entitled to have his title quieted against the plaintiff herein for that part of the land described as the "homestead" allotment of Agnes Wolfe deceased.

6. The court further finds that there being no evidence showing whether the cultivated lands upon said allotment was located upon that part of the lands designated as a homestead or surplus, the plaintiff should take nothing by reason of his claim for rents, and it is so ordered.

The plaintiff in error, C. E. Gannon says that upon said findings of fact and conclusions of law, and to wit, on the 18th day of September 1912, a judgment was entered in the trial court of Jefferson County Oklahoma in favor of D. R. Johnston and against C. E. Gannon for that portion of the land allotted to Agnes Wolfe as her "surplus" allotment, quieting his title thereto and cancelling of record the conveyances held by this plaintiff in error, and in rendering said judgment aforesaid it was necessary for said trial court to construe section 16 of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the Government of the United States and the trial court did construe said section 16

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supra and held that the "surplus" allotment of Agnes Wolfe deceased in the hands of Wilborn Wolfe her sole heir was restricted, and this plaintiff in error further states that the trial court of Jefferson County, Oklahoma, did on the 18th day of September 1912 render judgment for C. E. Gannon for that portion of the allotment of Agnes Wolfe deceased known as the "homestead" allotment, quieted his title thereto and cancelled of record all conveyances affecting his title thereto.

The plaintiff in error herein, within the time prescribed by statute, filed his motion for new trail, which motion for new trial was overruled, and to which overruling the motion for new trial, the plaintiff in error C. E. Gannon excepted and appealed to the State Supreme Court, and that to wit, on the 28 day of April, 1914 the Honorable Supreme Court of the State of Oklahoma rendered its final decree and judgment, whereby it was adjudged and decreed that the judgment of the District Court of Jefferson County, Oklahoma, be affirmed as against this plaintiff in error C. E. Gannon.

Plaintiff in Error C. E. Gannon would further respectfully represent and state unto this Honorable Court, that in the trial of this cause in the District Court of Jefferson County, Oklahoma, and in the Supreme Court of the State of Oklahoma, and which said Supreme Court of the State of Oklahoma is the court of last resort in said State of Oklahoma, and that in the record and proceedings and transcript, to which a reference is here made, manifest error occurred and was committed by the said Supreme Court of the State of Oklahoma to the damage of the plaintiff in error herein C. E. Gannon, whereof, he feels himself aggrieved.

Plaintiff in Error would further respectfully represent and state to this Honorable Court, that in the record, proceedings and transcript, it will appear, that there was drawn in question, the
12 construction of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the United States of America, section sixteen thereof, (32 Stat. L. 641), also a construction of what is commonly known as the "Atoka Agreement," which is the Act of Congress of June 28th, 1898, (30 Stat. L. 495).

Plaintiff in Error would further respectfully represent and state to this Honorable Court, that it was necessary to construe said Acts of Congress by the Supreme Court of the State of Oklahoma in order to render the final decree and judgment that was rendered herein.

Wherefore, your Petitioner, feeling himself aggrieved by said final judgment of the Supreme Court of the State of Oklahoma, appeals from said judgment and the whole thereof, upon the reasons specified in the assignment of errors filed herewith and prays the appeal may be allowed; that a writ of error be allowed and granted, and that the said final decree and judgment, all pleadings, mandate, orders, transcript, record and other proceedings had in said cause, may be transmitted to the Supreme Court of the United States, to the end that this Honorable Court may hear said cause anew, and that the said judgment and decree of the Supreme Court of the State of Oklahoma be reversed, and that a decree may be made

herein remanding said cause for further proceedings in the court below, or that such decree may be made as to this Honorable — may seem just and proper.

H. A. LEDBETTER,
Attorney for Plaintiff in Error.

13 Filed Apr. 14, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States, at Washington, D. C.

C. E. GANNON, Plaintiff in Error,
vs.
D. R. JOHNSTON et al., Defendants in Error.

Assignment of Errors.

Plaintiff in Error, C. E. Gannon complaining of the Defendants in Error D. R. Johnston and Wilborn Wolfe, states that in the Supreme Court of the State of Oklahoma, a final decree and judgment was rendered against this Plaintiff in Error and in favor of the Defendants in Error herein, and from which said judgment, the Plaintiff in Error having appealed to this Honorable Court, and a writ of error having been duly issued, signed by the United States District Clerk for the Western District of Oklahoma and by the Honorable Mathew J. Kane, Chief Justice of the Supreme Court of the State of Oklahoma, Now therefore, the premises considered, the Plaintiff in Error, C. E. Gannon assigns as error of the Honorable Supreme Court of the State of Oklahoma, the following.

First. The Supreme Court of the State of Oklahoma erred in its construction of section sixteen of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the Government of the United States, which Treaty was ratified September 25th, 1902, (32 Stat. L. 641), wherein the said Supreme Court of the State of Oklahoma held that where an Indian had selected his "surplus" allotment and afterwards died, that the land in the hands of his heirs was restricted for one, three and five years from the date of patent.

Second. The Supreme Court of the State of Oklahoma erred in holding that the deed made by Wilborn Wolfe to D. R. Johnston was not within the Champerty Statute of the State of Oklahoma.

Third. The Supreme Court of the State of Oklahoma erred in holding that D. R. Honshton had a right to join with him, Wilborn Wolfe, his champertous grantor, and thereby get indirectly
14 what the Champertous Statutes of the State of Oklahoma prohibited getting directly.

Fourth. The Supreme Court of the State of Oklahoma erred in holding that Wilborn Wolfe was entitled to sue for the use and benefit of his champertous grantee, D. R. Johnston, for that, under the Statutes of the State of Oklahoma, the said Wilborn Wolfe had violated the criminal Statutes of the State of Oklahoma by selling the land in controversy while he was out of possession thereof, and

while this Plaintiff in Error and his grantors had been in possession thereof for more than one year prior to the making of the conveyance by Wilborn Wolfe to D. R. Johnston.

Fifth. The Supreme Court of the State of Oklahoma erred in refusing to hold that a rule of property had been created as to the class of title acquired by this Plaintiff in Error, for that the testimony showed and the trial court found that the district courts of the State of Oklahoma, United States Court prior to Statehood, Supreme Court of the State of Oklahoma, the lawyers generally in the Chickasaw and Choctaw Nations, had construed section 16 of the Supplemental Treaty and held that such titles as the one held by this Plaintiff in Error *was* alienable, and that by such constructions for a period of 8 years, $10,000,000.00 had been invested in such titles.

Sixth. The Supreme Court of the State of Oklahoma erred in holding that the deed made by Wilborn Wolfe to A. J. Waldock was void.

For all of which reasons, Plaintiff in Error prays that this cause be reversed and that he have all other relief that he may be entitled.

H. A. LEDBETTER,
Attorney for Plaintiff in Error.

15 Filed Apr. 16, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

Case No. —.

C. E. GANNON, Plaintiff in Error,
vs.
D. R. JOHNSTON et al., Defendants in Error.

Order Fixing Amount of Bond.

A bond to supersede the judgment rendered herein is hereby fixed at the sum of $1,000.00 and when said bond is executed to D. R. Johnston, and Wilborn Wolf, in said amount and approved the same shall act as a supersedeas.

This 16 day of April, 1915.

MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

WM. M. FRANKLIN,
Clerk Supreme Court,
State of Oklahoma.

16 Filed Apr. 17, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

The President of the United States of America to the Honorable Matthew J. Kane, Chief Justice of the Supreme Court of Oklahoma, and the Associate Justices of said Court, and to the Clerk of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record of the proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of the State of Oklahoma before you, being the highest Court of law and equity of the state in which a decision can be had in the said suit between C. E. Gannon, as Plaintiff in Error, and D. R. Johnston, and Wilborn Wolfe, are Defendants in Error, whereon a final decree and judgment was rendered in said cause in favor of the Defendants in Error herein, quieting the title to that portion of the allotment of Agnes Wolfe, deceased, designated and commonly known as the surplus allotment, and cancelling of record the conveyances of the Plaintiff in Error who derived their title from Wilborn Wolfe, the sole heir at law of Agnes Wolfe, deceased, and adjudging that this Plaintiff in Error take nothing by his said petition in error, and wherein in said judgment of the said Supreme Court of the State of Oklahoma there was drawn in question the construction of certain Acts of Congress, and certain Treaties between the Choctaws
17 and Chickasaws and the United States, and by said judgment aforesaid of the said Supreme Court of Oklahoma it was necessary for the Supreme Court of Oklahoma to construe said Acts of Congress and Treaties, as aforesaid, in order to render judgment therein, and it appearing that manifest error has happened, to the damage of Plaintiff in Error, C. E. Gannon, as by his petition and assignment of errors appears, and we being willing that the error, if any hath been committed, should be duly and speedily corrected, and full justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal, distinctly and openly, you send a copy of the record of the proceedings aforesaid, with all things concerning the same, duly authenticated and verified, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C. at the Supreme Court within thirty days of the date hereof, that said record of said proceedings aforesaid being inspected by the Supreme Court of the United States, it may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the

Supreme Court of the United States, this the 16" day of April, in the Year of Our Lord Nineteen Hundred and Fifteen.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States for the Western District of Oklahoma.

MATTHEW J. KANE.

Allowed by
MATTHEW J. KANE,
Chief Justice of the Supreme Court of Oklahoma.

18 Filed Apr. 27, 1915. William M. Franklin, Clerk.

In the Supreme Court of the United States, Sitting at Washington, D. C.

Case No. 4793.

C. E. GANNON, Plaintiff in Error,
vs.
D. R. JOHNSTON et al., Defendants in Error.

Bond.

Know all men by these presents: That we, C. E. Gannon, as principal, and H. W. Thies, and T. E. Vessels, as sureties, are held and firmly bound unto D. R. Johnston, and Wilborn Wolfe, in the sum of $1,000.00, to be paid to the said D. R. Johnston and Wilborn Wolfe, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this the 20th day of April, 1915.

Whereas the above named Plaintiff in Error seeks to prosecute his Writ of Error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma;

Now, Therefore, the condition of this obligation is such that
19 if the above named Plaintiff in Error shall prosecute his Writ of Error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

C. E. GANNON, *Principal.*
H. W. THIES, *Surety.*
T. E. VESSELS, *Surety.*

STATE OF OKLAHOMA,
County of Garfield:

We, H. W. Thies and T. E. Vessels being each duly sworn, on oath depose and say: We are each of lawful age and are citizens of the

State of Oklahoma, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of $1,000.00 over all debts, liabilities and exemptions.

H. W. THIES.
T. E. VESSELS.

Subscribed and sworn to before me this the 21 day of April, 1915.
[SEAL.] CHAS. O'CONNOR,
Notary Public.

My Commission — Aug. 23, 1916.

Bond approved, and to operate as a supersedeas, this 26 day of April, 1915.

MATTHEW J. KANE,
Chief Justice Supreme Court of Oklahoma.

20 Filed Feb. 12, 1913. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 4793.

C. E. GANNON, Plaintiff in Error,
v.
D. R. JOHNSTON and WILBURN WOLFE, Defendants in Error.

Petition in Error.

C. E. Gannon, plaintiff in error, complaining of the defendants in error, D. R. Johnston and Wilburn Wolfe, states that heretofore, to wit, on the 17th day of September, 1912, in the District Court of Jefferson County, Oklahoma, the defendants in error, D. R. Johnston and Wilburn Wolfe recovered a judgment against C. E. Gannon, plaintiff in error, for the possession of E/2 NW/4 and East twenty acres of lot- one and two of section 31, Township 3 South, Range 7 West, and by the terms of said judgment, the title in and to said land was quieted in the said D. R. Johnston, the original case made being hereto attached, made a part hereof and marked Exhibit "A", and the plaintiff in error, C. E. Gannon says there is error in said judgment and proceedings for the following reasons, to wit:

First. The court erred in overruling the motion for new trial filed in the trial court by the plaintiff in error.

Second. The court erred in holding that the deed made by Wilburn Wolfe to D. R. Johnston was not within the champerty statute of this state.

Third. The court erred in holding that D. R. Johnston had a right to join with him, Wilburn Wolfe, his champertous grantor and thereby get indirectly what the champertous statutes of this state prohibited from getting directly.

Fourth. The court erred in holding that Wilburn Wolfe was unauthorized to alienate the E/2 NW/4 and the East
21-46 Twenty acres of Lot- 1 and 2 of section 31, Township 3 South, Range 7 West to the plaintiff in error's grantor, A. J. Waldock, for the reason that said land at the time of the conveyance by the said Wilburn Wolfe to the said A. J. Waldock was an inheritance in his hands, the same having been inherited under Chapter 49 of Mansfield's Digest of the Statute- of Arkansas and the Government appraised value having been paid, there were not other restrictions against the right of alienation under the Treaties between the Choctaws and Chickasaws and the United States and the Acts of Congress.

Fifth. The court erred in holding that Wilburn Wolfe was entitled to sue for the use of his champertous grantee, D. R. Johnston, for that under the Statutes of this state, the said Wilburn Wolfe had violated the criminal statutes of this state by selling the land in controversy while he was out of possession thereof and while this plaintiff in error and his grantors had been in possession thereof for more than one year prior to the making of said conveyance.

Sixth. That said judgment complained of herein is contrary to the law and is authorized under the law.

Wherefore, plaintiff in error prays that the judgment of the trial court be reversed and that this court render judgment in favor of the plaintiff in error, cancelling of record all conveyances affecting said land and quieting the title in the plaintiff in error.

C. E. GANNON,
By BRIDGES & VERTREES &
H. A. LEDBETTER,
His Attorneys.

* * * * * * *

47 In the District Court, Jefferson County, Oklahoma.

WILBURN WOLFE and D. R. JOHNSTON, Plaintiffs,
vs.
C. E. GANNON, Defendant.

Amended Petition.

Comes now Wilburn Wolfe and leave of the Court first being had and obtained makes himself a party plaintiff to this suit and he and D. R. Johnston plaintiffs herein, for cause of action against the defendant C. E. Gannon, alleges and states:—

That plaintiffs are residents of the State of Oklahoma and that plaintiff Wilburn Wolfe brings this suit as grantor and for the benefit of said plaintiff D. R. Johnston, to protect his warranty of title made in the deed hereinafter described, to said plaintiff D. R. Johnston.

That heretofore to-wit, on the 7th day of October, 1905 and on the 27th day of October 1905, patents were issued to Agnes Wolfe who was a full blood member of the Chickasaw Tribe of Indians

under Roll No. 347, granting to her the following described lands as her individual allotment of the Tribal lands of the Choctaw-Chickasaw Tribe of Indians, to-wit:

NE/4 of NW/4 and Lots 1 and 2 of Sec. 30; And E. ½ of NW/4 and E. 20 A. of Lot 1, And Lot 2 of Sect. 31, Township 3 South, Range 7 West.

and that the legal title to said lands thereby vested in said Agnes Wolfe.

48 That thereafter, to-wit, in the year 1903, the said Agnes Wolfe departed this life in that part of Indian Territory now comprised in Pontotoc County, Oklahoma, leaving surviving her as her sole and only heir at law, her brother Wilburn Wolfe one of the plaintiffs herein.

That on the 4th day of January, 1909, plaintiff Wilburn Wolfe conveyed said described lands by warranty deed to plaintiff D. R. Johnston. That said deed was approved by the County Court of Pontotoc County, the court having jurisdiction of the estate of said Agnes Wolfe, deceased, on the 23rd day of March, 1909 and said deed and conveyance was approved by the Secretary of the Interior of the United States of America, in accordance with the Laws of Congress, on the 2nd day of July, 1910, and said deed was filed for record in the office of the Register of Deeds of Jefferson County, Oklahoma, on the 25th day of March, 1909, and recorded in said office at Book 18 of Deeds at Page 447, and that the Order of the County Court of Pontotoc County approving said deed was filed for record in the same office on the same day and duly recorded in Book 8 of Misc. Records at Page 538, and that by reason of the above facts the legal title to said lands vested in said plaintiff D. R. Johnston.

That said defendant claims title and estate in said premises adverse to said title of plaintiff D. R. Johnston, the nature of which is as follows:—Said defendants hold a deed to said premises, executed by Henry E. Wilson and Grace I. Wilson to said defendant

49 on the 30th day of November, 1907, filed for record April 3rd, 1908, in the office of the Register of Deeds of Jefferson County, Oklahoma and recorded in said office at Book 1 of Deeds at page 451. That said claim of said defendant to said premises is without right as against this plaintiff and said defendant has no title, estate, right or interest in said premises or any part thereof.

That said pretended deed of said defendant is void and of no effect for the reason that said Henry E. Wilson and Grace I. Wilson had no right, title or interest in said premises and could convey none for the reason that said Henry E. Wilson claimed title through the Bankers Trust Company of Ardmore who claimed title from the Choctaw Investment Company which in turn claimed title through one A. J. Waldock who claimed title to said premises by virtue of a deed from Wilburn Wolfe, one of the plaintiffs herein, dated October 13th, 1903, filed for record Oct. 26th, 1903, in the office of Ex officio recorder of the 20th Recording District of the Indian Territory at Ryan and recorded in Book 3 at page 3.

That said pretended deed from Wilburn Wolfe to A. J. Waldock

was and is void and of no effect, for the reason that the said lands, were, at the time said deed was executed, restricted lands and said Wilburn Wolfe under the laws of Congress then in force had no power at that time to make a valid conveyance of said lands; the said Agnes Wolfe the deceased allottee of same being a full blood
50 Chickasaw Indian, and said Wilburn Wolfe being also a full blook Chickasaw Indian, and said deed to said A. J. Waldock not being approved by the Secretary of the Interior of the United States as required by the Laws of Congress. That none of the conveyances above set forth down to that of the defendant herein have been approved by the Secretary of the Interior or by any Court of competent jurisdiction.

That said deed from Wilburn Wolfe is void for the further reason that at the time it was executed *executed* to said A. J. Waldock patents had not been issued conveying the title to said lands from the Choctaw and Chickasaw Tribes to said Agnes Wolfe, said allottee.

That said deed from Wilburn Wolfe to said A. J. Waldock is void and of on effect for the further reason that said A. J. Waldock did not pay for same the appraised value of said lands as fixed by the Commission to the Five Civilized Tribes; said deed having been made while the Choctaw-Chickasaw Tribal governments were in force. That the appraised value of said lands has not been paid to said Wilburn Wolfe by the defendant or any person through whom he claims, and that the consideration paid by said A. J. Waldock to said Wilburn Wolfe for said lands was unfair, unjust and disproportionate to the value of said lands and said deed is for that reason void and all subsequent deeds based upon his claim of title void for the same reason.

51 That said pretended deed held by defendant and the deeds through which he claims title are clouds on the title of plaintiff to said premises and unless canceled and set aside by this court, will irreparably injure the said title of plaintiff herein.

II.

The plaintiff D. R. Johnston as heretofore stated has the legal estate in fee simple and the equitable estate in and to said above described real estate and is entitled to the immediate possession of the same and that said defendant is wrongfully in possession of said lands and has wrongfully withheld possession of said lands from this plaintiff since the 23rd day of March, 1909.

That said defendant has been unlawfully in possession of said premises since said last above named date and has kept plaintiffs out of possession of same during said time and has collected and used for his benefit during said time, the rents and profits arising from said real estate amounting to $2,000.

Plaintiff further states that they have been damaged in the sum of $500 by said defendant so unlawfully withholding said possession.

Wherefore, the premises considered, plaintiffs pray that defendant be required to set forth the nature of his claim to said premises,

if any; that this court decree that plaintiff's claim and title to said premises, to-wit:

52 W/2 of NW/4 and East 20 acres of Lot 1 and Lot 2 of Section 31 and NE/4 of NW/4 and Lots 1 and 2 of Sect. 30, Township 3 south, range 7 west, Jefferson County, Oklahoma.

described in saome of the deeds hereinbefore described as:

N/2 of NW/4 and SW/4 of NW/4 of Section 30, and S/2 of NW/4 and E/2 of NW/4 of NW/4 and NE/4 of NW/4 of Section 31, in Township 3 south, Range 7 West, Jefferson County, Oklahoma.

is valid and perfect and that the defendant has no right, valid claim or title therein, nor any interest whatsoever in said premises; that the title of plaintiffs in said premises be quieted in said D. R. Johnston and that said defendant be perpetually enjoined from setting up or asserting any title or interest in said premises adverse to this plaintiff; That plaintiffs have judgment for the immediate possession of said premises and judgment for $2,500 against said defendant for rents and profits and damages for the wrongful withholding of same by said defendant; for costs and such other relief as may be equitable and proper; and in the event the court should find that the possession of defendant in said premises at the time the deed heretofore described was made to said D. R. Johnston, was adverse to this plaintiff Wilburn Wolfe, that he have the relief herein prayed for, to inure to the benefit of said D. R. Johnston.

KENNAMER & COAKLEY,
Attorneys for Plaintiffs.

53 (Said Amended Petition is indorsed on back as follows:) 1826. In District Court, Jefferson Co., Okla. Wilburn Wolfe, D. R. Johnston, Plaintiffs, vs. C. E. Gannon, Defendant. Amended Petition. Filed Sept. 13, 1911. R. F. Brown, Clerk District Court, Jefferson County, Okla. Kennamer & Coakley, Madill, Okla., Att'ys for Pl't'ff.

And be it remembered, that on the 13th day of September 1911 the defendant C. E. Gannon filed in said cause a demurrer to the amended petition of the plaintiffs Wilburn Wolfe and D. R. Johnston, said demurrer being in words and figures as follows, to-wit:

54 In the District Court in and for Jefferson County, Oklahoma.

No. —.

D. R. JOHNSTON et al., Plaintiffs,
vs.
C. E. GANNON, Defendant.

Demurrer.

Now comes the defendant and demurs to the amended petition of the plaintiff D. R. Johnston, and as grounds therefor, says, that the statements and allegations contained in said amended petition are insufficient in law or equity to constitute a cause of action in favor of the plaintiffs, and against the defendant, and that the statements and allegations contained therein are insufficient to warrant the relief prayed for in said amended petition, for which reasons defendant prays judgment of the Court.

BRIDG-S & VERTREES AND
H. A. LEDBETTER,
Attorneys for Defendant.

(Indorsed on back as follows, to-wit:) No. 1826. District Court of Jefferson County, Oklahoma. D. R. Johnston et al. Plaintiffs, vs. C. E. Gannon, Defendant. Demurrer. Filed Sep. 13,
55 1911. R. D. Brown, Clerk District Court, Jefferson County, Okla. H. A. Ledbetter, and Bridges & Vertrees, Attorneys for Defendant.

And be it remembered that on the 13th day of September, 1911, the Court made an order in said cause Overruling the foregoing demurrer of the defendant to the amended petition of the plaintiffs, said Order of the Court being in words and figures as follows, to-wit:

56 In the District Court Within and for Jefferson County, Oklahoma.

No. —.

D. R. JOHNSTON et al., Plaintiffs,
vs.
C. E. GANNON, Defendant.

Order Over-ruling Demurrer.

Now on this the 13th day of September, 1911, came on to be heard the demurrer of the defendant to the amended petition of the plaintiff, and the court after hearing said demurrer and the argument in

support thereof is of the opinion that said demurrer should be over-ruled,

It is therefore ordered, adjudged and considered by the court, that said demurrer of the defendant to the amended petition of the plaintiff be and the same is herebu in all things over-ruled, to which action of the court the defendant excepted.

FRANK M. BAILEY, *Judge.*

(Said order is endorsed on back as follows:) #1826. D. R. Johnston et al. vs. C. E. Gannon. Order. Filed Sept. 13, 1911. R. F. Brown, Clerk District Court, Jefferson County, Okla. Recorded in Journal 2 page 395.

57 And be it remembered that thereafter, and to-wit: on the 25th day of September, 1911, the Defendant C. E. Gannon, filed in said cause his amended answer and cross-petition, said Amended Answer and Cross petition being in words and figures as follows, to-wit:

In the District Court of Jefferson County, State of Oklahoma, Sitting at Ryan.

No. 1826.

D. R. JOHNSTON et al., Plaintiffs,
vs.
C. E. GANNON, Defendant.

Amended Answer and Cross-petition.

Comes now the defendant C. E. Gannon, and for Answer to the amended petition of the plaintiff, *and* denies each and every material allegation therein contained.

Further answering, and by way of cross-petition, this defendant states and now charges the truth to be that the lands described in plaintiffs' amended petition, and being the Northeast quarter of the Northwest quarter, and Lots 1 and 2 of Section 30, and the east half of North West quarter, and the East 20 acres of Lot 1, and Lot 2 of Section 31, Twp. 3 South, Range 7 West, were allotted to

58 and in the name of Agnes Wolfe, a Choctaw Indian, as shown by certified copies of the patents hereto attached, and made a part hereof, and marked "Exhibits A & B"; and after the allotment aforesaid, Wilburn Wolfe, a single person and sole and only heir at law of said Agnes Wolfe, deceased, made, executed and delivered, duly acknowledged, his warranty deed to said lands to one A. J. Waldock, for and in consideration of the sum of Ten Hundred and fifty dollars, as is expressed in said Warranty Deed, which said ten hundred and fifty dollars was the consideration agreed upon by the said A. J. Waldock and Wilburn Wolfe, a copy of which warranty deed is hereto attached and made a part hereof, and marked

"Exhibit C"; that said deed was filed for record in the office of the Register of Deeds, at Ryan, being the recording district wherein said land is situated, and that immediately after receiving said deed by said A. J. Waldock, he the said A. J. Waldock went into possession of said lands.

Third.

That afterwards and to-wit, on the 23rd day of October, 1905, the said A. J. Waldock, joined by his wife Ella Waldock, conveyed said land to the Choctaw Investment Company, a corporation, as shown by a copy of said conveyance hereto attached and made a part hereof, and marked "Exhibit D"; and that said deed was recorded at Ryan, Oklahoma, in Book 12, on page 122, and that immediately after receiving said deed by said Choctaw Investment Company they immediately went into possession of said lands.

59

Fourth.

That the Choctaw Investment Company conveyed said land by deed of conveyance to the Bankers Trust Company, a corporation, as is shown by said deed, a copy of which is hereto attached and made a part hereof, and marked Exhibit "E"; that said deed of conveyance was recorded at Ryan, in Book 13, page 416, and that immediately after the execution of said deed the Bankers Trust Company went into the possession of said lands.

Fifth.

That the Bankers' Trust Company by deed of conveyance conveyed said lands to Henry E. Wilson as of date October 22nd, 1906, a copy of which deed of conveyance is hereto attached and made a part hereof, and is marked Exhibit "F"; and tha tsaid deed of conveyance is recorded in the office of the Register of Deeds at Ryan, in Book 16, page 646, and that said Henry E. Wilson, immediately after receiving said deed went into possession of said lands.

Sixth.

That said Henry E. Wilson, joined by his wife Grace I. Wilson made, executed, acknowledged and delivered to the defendant herein, for a valuable consideration, cash in hand paid, their warranty deed to said lands, a copy of which deed is hereto attached, marked Exhibit "G" and made a part hereof; that said deed was recorded in the office of the Register of Deeds, at Ryan, Oklahoma, wherein said land is situated, in Book 1, page 454, and that this defendant

60 immediately thereafter went into the possession of said land, which was on or about the 3rd day of April, 1908.

Seventh.

The defendant further states that said consideration so paid to said Henry E. Wilson, for said lands was a reasonable consideration for said lands, and that ever since receiving said deed as aforesaid,

he has been in actual and peaceable possession of said lands, and is now in possession thereof, during all of which time he has been paying the taxes on said lands and receiving the rents, revenues and profits arising therefrom.

Eighth.

The defendant further states and charges the truth to be that on to-wit; the 4th day of January, 1909, the plaintiff herein, D. R. Johnston, procured from Wilburn Wolfe, the other plaintiff herein a deed to the land described in plaintiff's petition, and caused said deed to be recorded in the office of the Register of Deeds of Jefferson County, Oklahoma in Book 18 page 447, and now this defendant says and charges to be true, that at the time of the taking of said deed, and for more than one year prior thereto, this defendant and his grantors were in possession of said lands asserting title thereto by virtue of the conveyances mentioned and described herein, and that at the time of taking said deed from said Wilburn Wolfe, and for more than
61 one year prior thereto, the defendant and his grantors were in possession of said lands asserting title thereto by vortue of the conveyances mentioned and described herein, and that at the time of the taking of said deed by said D. R. Johnston, one of the plaintiffs herein from said Wilburn Wolfe, and for more than one year prior thereto, the plaintiff D. R. Johnston and Wilburn Wolfe had not been in possession of said lands described herein, and had not received the rents, revenues, or profits arising therefrom.

Nineth.

That by reason of the statements and allegations contained in this answer and cross petition this defendant has the legal and equitable title to said lands described herein, and as described in plaintiff's petition, and this defendant is now in possession of said lands and has been in such possession since the 3rd of April, 1908.

Tenth.

That the deed taken in the name of the plaintiff on the 4th day of January, 1909, and recorded in the office of the Register of Deeds of Jefferson County, Oklahoma, in Book 18, page 447, by reason of the statements and allegations contained in paragraph eight herein is void as against this defendant, being in violation of the champerty and maintenance statutes of this State, but this defendant states that the appearance of the same of record wherein said land is situated impairs the value of this defendant's
62 said land, and constitutes a cloud upon the title of the defendant to said lands.

Eleventh.

Now this defendant further states, and charges to be true, that the lands purchased by said A. J. Waldock from Wilburn Wolfe, were purchased by him from said Wilburn Wolfe under Sections 12 and 16 of the Supplemental Treaty, between the Choctaw and Chick-

asaw Nations and the Government of the United States ratified September 25th, 1902; that provision of the Treaty which is as follows:—

"Sec. 12, Each member of said tribes shall at the time of the selection of his allotment designate his homestead out of said allotment, lands equal in value to 160 acres of average allotable lands under the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the life of the allottee."

Not exceeding 21 years from the date of the certificate of the allotment, and separate certificate and patents shall issue for said allotment, and Section 16 being as follows:—

"all lands allotted to members of said tribes, except such lands as are set aside to each for a homestead, as herein provided, shall be alienable after the issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case from the date of patent, provided that said lands shall not be alienable by the allottee's heir, or heirs, at any time before the expiration of the Choctaw and Chickasaw Tribal Governments, for less than its appraised value."

63 The defendant now states and charges the truth to be that under and by virtue of said Choctaw and Chickasaw Supplemental Agreement, aforesaid, it was the construction of a majority of the lawyers of the Indian Territory, that the lands inherited were alienable by the heirs, and that upon the construction so placed upon said supplemental treaty aforesaid, by a majority of the lawyers, and a vast amount of money was invested in inherited lands by investors and by farmers; that the judges of the United States Courts of the Indian Territory prior to the admission of the state into the Union gave as their judgment that said lands so inherited by the heirs were alienable, and that by reason thereof a vast amount of money was invested in such inherited lands by the investors and by the farmers:

That since the admission of the State into the Union it has been the universal construction by a majority of the lawyers of the State, that the lands so inherited under the provisions of said Treaty, aforesaid, were alienable, and by reason of the opinion of the lawyers vast amounts of money were invested on said inherited lands by the investors and farmers:

That since the admission of the state into the Union it has been universally held and construed by the Courts of the Indian Territory portion of the State, that said lands inherited under and by virtue of the provisions of the treaty aforesaid were alienable, and by reason thereof vast amounts of money have been invested by the investors and farmers:

64 That since the admission of the State into the Union, to-wit; on the 13th day of July, 1909, the Supreme Court of the State of Oklahoma, in the case of Francis Hancock, et al. vs. the Mutual Trust Company, et al., 103 Pacific Reporter, page 583, the Supreme Court of this State held that said lands so inherited under the provisions of said supplemental treaty aforesaid, were alienable, and by reason of which decision vast amounts of money have been invested in said lands by investors and farmers:

That by reason of the universal construction of said provisions of the treaty aforesaid, and judgments of the Courts aforesaid, Loan Companies in this State and other states of the Union have loaned vast amounts of money upon the opinions of the lawyers aforesaid, the judges of the Courts, aforesaid, and the Supreme Court aforesaid.

That it has been construed universally by a majority of the lawyers of this State, and by the judges of the different courts wherein questions would arise, that said lands so inherited were alienable under the provisions of the treaty aforesaid, after the issuance of certificates of allotment, and this construction had been followed for a period of Eight years, and by reason of which at least Ten Million of Dollars have been invested in such inherited lands.

Twelfth.

That by reason of said above statements as contained in paragraph 11, if it should be technically construed that under Section
65 16 of the Supplemental Treaty, the lands so inherited could not be sold by the heirs, until the expiration of the one, three and five years after issuance of patents, then this defendant says, that the construction of said treaty aforesaid, by a majority of the lawyers, and by the United States Courts prior to statehood, and by the District Courts of the State since the admission of this State into the Union, and by the Supreme Court of the State, as aforesaid, it has become a rule of property that such lands are alienable, and

This defendant states and charges the truth to be that if it should be technically construed that the lands known as the "Homestead" under Section 12 of the Supplemental treaty were inalienable by the heirs for a period of 21 years, that by reason of the opinion of a majority of the lawyers, aforesaid, and the United States Courts prior to Statehood, and by the decisions of the District Courts of this State since the admission of this State into the Union, and by the opinion of the Supreme Court of this State, then this defendant says, that such construction by the lawyers, and Courts have established a rule of property as to such inherited lands.

And, Now the defendant having fully answered he prays that the plaintiff- take nothing by their action, and that this defendant have judgment against the plaintiffs herein quieting his title in and to said lands described in plaintiff's petition, and that the conveyance made by said Wilburn Wolfe to the plaintiff D. R. Johnston,
66 as of date January 4th, 1909, and recorded in Book 18, page 447 of the records of the office of Register of Deeds, of Jefferson County, Oklahoma, be cancelled and held for naught, and that the plaintiffs D. R. Johnston and Wilburn Wolfe be enjoined and restrained from claiming, or asserting any right, title, claim or interest in and to said lands, and that this defendant have all other relief to which he may be entitled.

(Signed) BRIDGES & VERTREES AND
H. A. LEDBETTER,
Attorneys for Defendant.

STATE OF OKLAHOMA,
Carter County, ss:

I, H. A. Ledbetter, on oath state, that I am one of the attorneys for the defendant in the above and foregoing styled cause, and that the defendant is absent from Jefferson County, Oklahoma, and from this County, and that I am personally acquainted with the statements and allegations contained in the above and foregoing answer, and cross-petition, and that I make this affidavit as agent and attorney for the defendant, and I further state that the allegations and statements contained therein are true.

H. A. LEDBETTER.

Subscribed and sworn to before me this 24 day of September, 1911.
[SEAL.] F. M. ADAMS,
Notary Public.

My commission expires Jan'y 1, 1915.

67 (Said Amended Answer and cross-petition is endorsed on its back as follows, to-wit:) No. 1826. District Court, Jefferson County, Oklahoma. D. R. Johnston, et al. Plaintiffs vs. C. E. Gannon, Defendant. Amended Answer and Cross Petition. Bridges & Vertrees and H. A. Ledbetter, Attorneys for Defendant. Filed Sept. 25, 1911. R. F. Brown, Clerk District Court, Jefferson County, Okla.

NOTE.—Exhibits "A, B, C, D, E, F, and G" Referred to in the foregoing answer and cross-petition, and made a part thereof, are not attached thereto, but the same may be found by referring to the original Answer and Cross-Petition of the Defendant appearing in this record on pages from No. 16 to 23 inclusive of this case made, to which reference is here made.

D. M. CAVONESS,
Official Court Reporter.

68 And be it remembered that thereafter on the 8th day of December, 1911, the Plaintiffs filed in said cause their Reply to the answer and cross petition of the defendant, said Reply being in words and figures as follows, to-wit:

STATE OF OKLAHOMA,
County of Jefferson:

In the District Court of said County and State.

WILBURN WOLFE and D. R. JOHNSTON, Plaintiffs,
vs.
C. E. GANNON, Defendant.

Reply to Answer and Cross-petition.

Now comes the plaintiffs, Wilburn Wolfe and D. R. Johnston and for reply to the defendant's answer herein deny each and every allegation not hereinafter admitted.

Plaintiffs allege that on the 4th day of January, 1909, the date upon which the plaintiff, Wilburn Wolfe, executed to the plaintiff, D. R. Johnston a warranty deed conveying the lands described in the plaintiff's petition and the defendant's answer and cross-petition, that said lands were unimproved and unoccupied lands and
69 that the Defendant or his tenant had never resided upon said lands.

That prior to the date the plaintiff D. R. Johnston purchased said lands he went upon said lands and made a personal inspection of the said lands and found the same to be unimproved and unoccupied and that at the time he purchased said lands the taxes for the year 1908 were unpaid and said plaintiff paid said taxes and has paid all taxes due upon said lands since said time.

Plaintiffs allege that since the said D. R. Johnston purchased said lands from the said Wilburn Wolfe and on or about the — day of March, 1909, the defendant has unlawfully by his tenants and agents collected the rents and profits from said lands without the consent and in violation of the rights of the plaintiff D. R. Johnston, herein.

Wherefore, the premises considered the plaintiffs pray the judgment of the court as set forth in their petition.

(Signed) KENNAMER & COAKLEY AND
JONES & GREEN,
Attorneys for Plaintiffs.

F. E. Kennamer, of lawful age being duly sworn says he is one of the attorneys of record for the plaintiff- herein and that said plaintiffs are non residents of the County of Jefferson, State of Oklahoma, and that the matters set forth in the foregoing reply are within his knowledge and are true and correct as he verily believes.
70–80 F. E. JENNAMER.

Subscribed and sworn to before me this the 13th day of Sept. 1911.
[SEAL.] R. F. BROWN,
Notary Public.

(Said reply is indorsed on back as follows:) No. 1826. Wilburn Wolfe and D. R. Johnston Plaintiffs vs. C. E. Gannon, Defendant. Reply to answer and cross petition. Filed in open court Dec. 8, 1911. R. F. Brown, Clerk District Court, Jefferson County, Okla.

* * * * * * *

81 Choctaw and Chickasaw Nations.

Homestead Patent.

Record —.
Page —.
Homestead Patent No. 2499.
Date of Certificate July 7, 1903.
To —— ——, Chickasaw by Blood.
Dated (as below) —.
Filed —.
Roll No. 347.

The Choctaw and Chickasaw Nations, Indian Territory.

To all to whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, It was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue, and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Agnes Wolfe, a citizen of the Chickasaw Nation, as a homestead.

Now, therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor or the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Agnes Wolfe all the right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz:

The North East Quarter of the North West Quarter and Lots One (1) and Two (2) of Section Thirty (30) Township Three (3) South and Range Seven (7) West, (Chickasaw Nation), of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Fifteen and 30/100 (115.30) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat., 641) pertaining to allotted homesteads.

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Dated June 29th, 1905.

[Seal of Choctaw Nation.]

GREEN McCURTAIN,
Principal Chief of the Choctaw Nation.

Dated Sept. 12th, 1905.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSTON,
Governor of the Chickasaw Nation.

Department of the Interior.

Approved Oct. 7, 1905.

THOMAS RYAN,
Acting Secretary,
By OLIVER A. PHELPS,
Clerk.

L. R. S.

Filed for record this 13 day of Oct., 1905, at 3 o'clock P. M. and recorded in Book 7, Page 125, at Muskogee.

TAMS BIXBEY,
Commissioner to the Five Civilized Tribes,
By HAL BELFORD, *Clerk.*

Exhibit "A."

82 Said Exhibit "A" is indorsed on its back as follows, to-wit: Homestead Patent, No. 2499. Indexed. Compared. Choctaw and Chickasaw Nations to Agnes Wolfe. 5551. This instrument was filed for record on the 26 day of Mar. A. D. 1909, at 9 A. M. and duly recorded in Book 1 H. P. R. on page 219. M. C. Fisher, Register of Deeds, Jefferson Co., Okla., by H. Treadwell, Dep. $1.15 paid.

Plaintiff's said Exhibit "B" is in words and figures as follows, to-wit:

EXHIBIT "B," PLAINTIFF'S.

83 Choctaw and Chickasaw Nations.

Allotment Patent.

Record —.
Page —.
Allotment Patent No. 1785.
To —— ——, Chickasaw by Blood.
Date of Certificate July 7, 1903.
Dated (as below) —.
Filed —.
Roll No. 347.

The Choctaw and Chickasaw Nations, Indian Territory.

To all to whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat. 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, It was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Agnes Wolfe, a citizen of the Chickasaw Nation, as an allotment exclusive of land equal in value to one hundred and sixty acres of average allottable land of Choctaw and Chickasaw Nations selected as a homestead as aforesaid.

Now, therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey unto the said Agnes Wolfe all the right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz:

The East half of the North West quarter and the East Twenty (20) Acres of Lot One (1) and Lot Two (2) of Section Thirty-one (31), Township Three (3) South and Range Seven (7) West, (Chickasaw Nation), of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Thirty-seven and 78/100 (137.78) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat., 641).

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Date- June 29th, 1905.

[Seal of Choctaw Nation.]

GREEN McCURTAIN,
Principal Chief of the Choctaw Nation.

Date- *Date*- Sept. 12th, 1905.

[Seal of the Chickasaw Nation.]

DOUGLASS H. JOHNSON,
Governor of the Chickasaw Nation.

Department of the Interior.

Approved Oct. 27, 1905.

ETHAN A. HITCHCOCK,
Secretary,
By OLIVER A. PHELPS, *Clerk.*
E. R. S.

Filed for record this 4 day of Nov., 1905 at 2 o'clock P. M. and recorded in Book 4, Page 172, at Muskogee.

TAMS BIXBEY,
Commissioner to the Five Civilized Tribes,
By HAL BELFORD, *Clerk.*

"Exhibit B."

84 Indorsed on back as follows: Allotment Patent. No. 1785. Indexed. Compared. Choctaw and Chickasaw Nations to Agnes Wolfe. Filed for record on the 4 day of Nov. 1905 at 2 o'clock P. M., and recorded in book 4, page 172. Tams Bixbey, Commissioner to the Five Civilized Tribes, By Hal Belford, Clerk. 5552. This instrument was filed for record on the 26 day of Mar. A. D. 1909, at 9 A. M. and duly recorded in book 1 A. P. R. on page 294. M. C. Fisher, Register of Deeds, Jefferson Co., Okla. By H. Treadwell, Dep. (Seal). $1.15 d.

85 Mr. Kennamer: The plaintiff now offers in evidence Exhibit "C", being the Census Card of Agnes Wolfe, the allottee. Exhibit "C." Certified Copy.

Mr. Ledbetter: No Objections.

Said Census Card of Agnes Wolfe, Exhibit "C" being in words and figures as follows, to-wit:

EXHIBIT "C," PL'T'F'S.

Residence, Pontotoc County.
Post Office, Conway, Ind. Ter.
Card No. —,
Field No. 113.

Chickasaw Nation.

Chickasaw Roll.

(Not Including Freedmen.)

Dawes's roll No.	Name.	Relation to person first named.	Age.	Sex.	Blood.
346	1. Russell, Sissy 56		52	F.	Full
347	2. Wolfe, Agnes 15	Ward	11	"	"

Tribal Enrollment.

Year.	County.	Page.
1897	Pontotoc	45
"	"	46

Tribal Enrollment of Parents.

Name of father.	Year.	County.	Name of mother.	Year.	County.
Sa-to-chi-key	Dead	Chickasaw Roll	Fo-lo-ti-ge	Dead	Chickasaw Roll
John Wolfe	"	"	Mulcey	"	Pontotoc

Enrollment of Nos. 1 and 2 hereon, Approved by the Secretary of the Interior Dec. 12, 1902.

Sept. 3/98.

Certificate.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having the custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true, and correct copy of Chickasaw Indian Census Card No. 113.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes,
By C. T. HUMPHREY, JR.,
86 *Clerk in Charge of Chickasaw Records.*

Muskogee, Oklahoma, Feb. 29, 1912.

C. H. D.

Mr. Kennamer: The plaintiff now offers in evidence plaintiff's Exhibit "D" being certified copy of the Census Card of Wilborn Wolfe.

Mr. Ledbetter: No objections.

Said Census Card, Exhibit "D" is in words and figures as follows, to-wit:

EXHIBIT "D," PL'T'FF'S.

Residence, Tishomingo County.
Post office, Emmett, I. T.
Card No. —.
Field No. 940.

Chickasaw Nation.

Chickasaw Roll.

(Not Including Freedman.)

Dawes's roll No.		Name.	Relation to person first named.	Age.	Sex.	Blood.
2805	1	Wilborn Wolfe	22	18	M.	Full

Tribal Enrollment.

Year.	County	Page.
1897	Tishomingo	34

Tribal Enrollment of Parents.

Name of Father.	Year.	County.	Name of Mother.	Year.	County.
John Wolfe	Dead	Panola	Mulsey Wolfe	Dead	Panola

Enrollment of Nos. 1 hereon Approved by the Secretary of Interior Dec. 21, 1902.

10/1/98.

Certificate of Copy.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having the custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true, and correct copy of Chickasaw Indian Census Card No. 940.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes,
By T. C. HUMPHREYS, JR.,
Clerk in Charge of Chickasaw Records.

87

Muskogee, Oklahoma, Feb. 29, 1912.

C. H. D.

Mr. Kennamer: Plaintiff offers in evidence Exhibit "E" certified copy of the filing of the land and showing appraised value of the land.

Mr. Ledbetter: No objections.

Said Exhibit "E," certified copy of the filing in in words and figures as follows, to-wit:

(168.)

EXHIBIT "E," PLAINTIFF'S.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

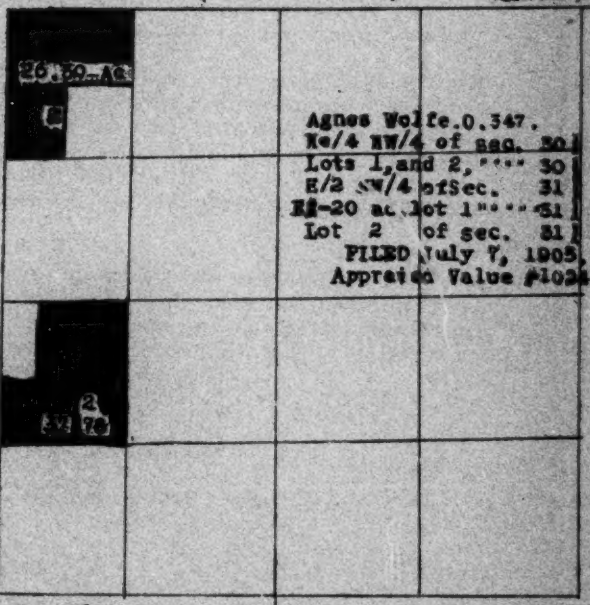
Chickasaw Nation.

Township No. 3 South, Sec. 30.

Range No. 7 West, Sec. —.

(Here follows diagram, marked page 87.)

(Hereto follows drawing marked page 87.



"Ex. Ex. E."

87

Sec.31.

48

Sec.---

88 *Certificate.*

"This is to certify, that I am the officer having the custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the official allotment plat showing Land allot-ed to Agnes Wolfe, Chickasaw By Blood, Roll No. 347, Red indicates Homestead" (at top).

Muscogee, Okla., Dec. 8, 1911.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes,
By T. C. HUMPHREYS, JR.,
Clerk in Charge of Chickasaw Records."

Mr. Kennamer: The plaintiff now offers in evidence plaintiff's Exhibit "E-2" being a certified copy of the proceedings of the County Court of Pontotoc County, Oklahoma, being the letters of Administration and all the Probate proceedings in the matter of the Estate of Agnes Wolfe, deceased. Exhibit "E-2."

Mr. Ledbetter: Objected to as incompetent, irrelevant and immaterial.

By the Court: Overruled.

Mr. Ledbetter: To which the defendant excepts.

Said plaintiff's Exhibit "E-2" being presented to the court and read to the court and being in words and figures as follows, to-wit:

Exhibit "E-2" Plaintiff's:

89 EXHIBIT "E-2," PLAINTIFF'S.

(*Certificate of True Copy.*)

STATE OF OKLAHOMA,
Pontotoc County, ss:

I, F. C. Sims, Clerk of the County Court, in and for the county and State aforesaid, do hereby certify that the instrument hereto attached is a full, true and correct copy of the proceedings in the appointment of Administrator of the estate of Agnes Wolfe, Dec'd as the same now appears of record and on file in this office.

Witness my hand and the seal of said court at Ada, Oklahoma, on this 14" day of May, 1909.

[SEAL.]

F. C. SIMS,
Clerk of the County Court.

Exhibit "E-2" continued:

90 *Proof of Publication.*

STATE OF OKLAHOMA,
Pontotoc County, ss:

In the County Court in and for said County and State.

In the Matter of the Estate of Agnes Wolfe.

Affidavit of Publication.

R. O. Wheeler of lawful age, being duly sworn upon oath deposes and says; that he is the Cashier of the Ada Weekly News printed in Ada, Pontotoc County, Oklahoma, and of a general circulation therein, and that the notice of publication, a copy of which is attached hereto, was published in said paper for three consecutive weeks, the first publication being on the 28th day of January, 1909, and the last day of publication being on the 11th day of February, 1909.

R. O. WHEELER, *Cashier.*

Subscribed and sworn to before me this the 13th day of February, 1909.

JOEL TERRELL,
County Judge.

(Indorsed on back as follows:) Estate of Agnes Wolfe, Dec'd. Proof of publication. Probate #708. Filed Feb'y 13th, 1909. Joel Terrell, County Judge, Pontotoc County, Okla. By F. C. Sims, Clerk.

Exhibit "E-2" continued:

91 In County Court.

STATE OF OKLAHOMA,
Pontotoc County:

In the Matter of the Estate of Agnes Wolfe, Deceased.

Know all men by these presents, That we A. H. Chapman as principal and —— —— —— —— as sureties, are held and firmly bound unto the State of Oklahoma, in the penal sum of Two Hundred and Fifty Dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

The condition of the above obligation is such, that whereas, by order of the County Court of Pontotoc County, State of Oklahoma, made and entered on the 15th day of February, A. D. 1909, the

above named principal was appointed administrator of the estate of Agnes Wolfe, deceased, and letters of administration were directed to issue to said principal, upon his taking and subscribing the oath required by law, and executing a bond to the state of Oklahoma, in the penal sum of Two Hundred and fifty dollars, with two or more sureties to be approved by the Judge of said Court.

Now if the above bounden principal shall faithfully execute the ditties of such trust as administrator according to law, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof, We have hereunto subscribed our names, this — day of ——, A. D. 19—.

A. H. CHAPMAN.
S. E. CHAPMAN.
W. B. JONES.

STATE OF OKLAHOMA,
Pontotoc County:

The undersigned, sureties on the foregoing bond, being duly sworn, on oath each for himself, says: I am a resident house-
92 holder and free holder within the State of Oklahoma, and have property within said state worth over and above all my just debts and liabilities, exclusive of property exempt from execution, the sum set out and stated below, that is to say:

I, S. E. Chapman, am worth the sum of..... $250.00
I, —— ——..... $.....
I, W. B. Jones, am worth the sum of..... $100.00
I, —— ——, am worth the sum of..... $.....
I, —— ——, am worth the sum of..... $.....

—— ——.
—— ——.
—— ——.

Subscribed and sworn to before me this 20th day of Feb'y 1909.

[SEAL.]

F. C. SIMS,
Clerk County Court.

I hereby approve the above bond this 20" day of Feb'y 1909.

JOEL TERRELL,
County Judge.

(Indorsed on back as follows:) No. 708. In the matter of the Estate of Agnes Wolfe, Deceased. Administrator's or Executor's Bond. Filed Feb'y 20th, 1909. Joel Terrell, County Judge. Recorded in Administrator's and Executor's Bond record, Book —, page —.

Exhibit "E-2" Contin'd:

98 In County Court.

STATE OF OKLAHOMA,
County of Pontotoc:

In the Matter of the Estate of Agnes Wolfe, Deceased.

A. H. Chapman is hereby appointed Administrator of the estate of Agnes Wolfe, Deceased.

Witness Joel Terrell, Judge of the County Court of Pontotoc County, State of Oklahoma, with the seal thereof affixed, the 15th day of Feb'y 1909.

[SEAL.] JOEL TERRELL,
County Judge.

STATE OF OKLAHOMA,
County of Pontotoc, ss:

I, A. H. Chapman, do solemn-y swear that I will perform according to law, the duties of administrator of the estate of Agnes Wolfe, Deceased, so help me God.

A. H. CHAPMAN.

Subscribed and sworn to before me, this 15" day of Feb'y 1909.

[SEAL.] F. C. SIMS,
County Court.

(Indorsed on back:) No. 708. In the matter of the estate of Agnes Wolfe, deceased. Letters of Administration. Filed Feb. 18th, 1909. Joel Terrell, County Judge. Recorded in administrator's record Book1 1, page 43.

Exhibit "E-2" Conti'd:

94 STATE OF OKLAHOMA,
Pontotoc County:

In County Court.

In the Matter of the Estate of Agnes Wolfe, Deceased.

Now on this 15th day of Feb'y 1909, there coming on for hearing the petition of A. H. Chapman for the appointment of A. H. Chapman as administrator of the estate of Agnes Wolfe, deceased, and petitioner appearing "A" in person and by his attorney I. M. King, and it being first proven that notice of this hearing has been given by publication of notice for 3 consecutive weeks in the Ada Weekly News, published at Ada, the first of such publications being on the 28th day of Jan. 1909, and the last on the 11th day of Feb'y 1909, and by mailing copies of said notice on the 26" day of Jan. 1909, postage prepaid, addressed to the heirs at law of said decedent resident of this State, so far as known to petitioner, and the court

having heard the evidence in support of said petition "B" no one appearing against the petition and no evidence being offered in opposition to it, and being fully advised in the premises.

It is ordered that A. H. Chapman be and hereby is appointed administrator of the estate of said Agnes Wolfe, deceased and the letters of administration issued to said C. H. Chapman upon his taking and subscribing the oath required by law, and executing a bond to the State of Oklahoma, in the sum of Two Hundred and Fifty Dollars, with sureties approved by the judge of said court as required by law.

JOEL TERRELL,
County Judge.

(Indorsed on back as follows:) No. 708. In the matter of the estate of Agnes Wolfe, deceased. Order Appointing Administrator. Filed. Feb'y 15th 1909. Joel Terrell, County Judge. Recorded in administrator's record Book 1, page 43."

Exhibit "E-2" continued:

95 In Re Application for Appointment of Administrator of the Estate of Agnes Wolfe, Dec'd.
#708.

Upon motion of petitioner by his attorney, I. M. King, the hearing of the application for the appointment of an administrator, in the above styled and numbered cause is continued until Feb. 15th, 1909.

JOEL TERRELL,
County Judge.

(Indorsed on back:) $—. #708. Order. In re estate Agnes Wolfe, Dec'd. C. H. Chapman, Administrator. Order. Filed March 6th, 1909. Joel Terrell, County Judge. Pontotoc County, Okla. By F. C. Sims, Clerk.

96 NOTE.—This order has the marks drawn through it as appears above.

D. M. CARANEAS,
Court Reporter.

(Indorsed on back as follows:) #708. Order to continue hearing. P. R. O. Journal, 1/310.

Exhibit "E-2" contiued:

97 STATE OF OKLAHOMA,
Pontotoc County, ss:

In County Court.

In the Matter of the Estate of Agnes Wolfe, Deceased.

Now on this 23rd day of Jan. 1909, A. H. Chapman, having filed in this court a petition alleging that Agnes Wolfe, died intestate on or about the — day of —— 1903, leaving property within the jurisdiction of this court, and praying for the appo-ntment of A. H. Chapman as administrator of said estate.

It is ordered — be and is hereby set for hearing on the 12th day of Feb'y 1909, at the hour of 10 o'clock A. M., and that notice thereof be given by publication for 3 consecutive publications in the Ada Weekly News published at Ada in said county and by mail to the heirs at law of said deceased resident of said State as required by law.

JOEL TERRELL,
County Judge.

(Indorsed on back:) No. 708. In the matter of the estate of Agnes Wolfe, deceased. Order for Hearing Petition for Letters of Administration. Filed Jan. 23d 1909. Joel Terrell, County Judge. Recorded in Administrator's record Book 1, page 43.

98 Exhibit "E-2" continued:

STATE OF OKLAHOMA,
Pontotoc County:

In County Court.

In the Matter of the Estate of Agnes Wolfe, Deceased.

To the heirs, next of kin, and creditors of Agnes Wolfe, Deceased:

You are hereby notified that A. H. Chapman, has applied to the County Court of Pontotoc County, State of Oklahoma, for letters of administration on the estate of Agnes Wolfe, deceased, to be granted to A. H. Chapman, and that said application will be heard in the court room of said Court in the city of Ada, in said County, on the 12" day of Feb'y 1909, at 10 o'clock A. M., at which time and place any person interested may appear and show cause if any they have why such petition should not be granted.

Witness my hand and the seal of said court hereto affixed this 23rd day of January, 1909.

JOEL TERRELL,
County Judge.

STATE OF OKLAHOMA,
Pontotoc County, ss:

I, the undersigned, do solemnly swear, that on the 26th day of Jan. 1909, I deposited in the post office copies of the within notice, postage prepaid, and addressed to "A" Wilburn Wolfe, at
99 Kingston, Okla., his post office, at their several places of residence, and that said persons are all of the heirs at law of the within named decedent resident of said State so far as known to me.

A. H. CHAPMAN.

Subscribed and sworn to before me, this 26" day of Jan. 1909.
[SEA-]

F. C. SIMS,
Clerk County Court.

(Indorsed on back as follows:) No. 708. In the matter of the estate of Agnes Wolfe, Deceased. Notice of Hearing Petition for Letters of Administration. Filed —— —, 190–. —— ——, County Judge.

Exhibit "E-2" contiued:

100 *Petition for Letters of Administration.*

STATE OF OKLAHOMA,
Pontotoc County, ss:

In the County Court.

To the Honorable Judge of the County Court for the County of Pontotoc, State of Oklahoma:

The petition of A. H. Chapman of said Pontotoc County respectfully shows:

That Agnes Wolfe died intestate on or about the — day of ——, 1903, at ——, County of Pontotoc, and State of Oklahoma.

That said deceased at the time of her death, was a resident of Pontotoc County, and State of Oklahoma.

That said deceased left estate, real and personal, in said Jefferson County, and the value and character of said property, so far as known to your petitioner, are as follows, to-wit:

A full allotment of land as a member of the Chickasaw Tribes of Indians of the appraised value of $1,040.00, and her proportionate share of the funds of the said tribe of Indians held in trust by the United States Government.

That the whole estate and effects for or in respect of which letters of administration are hereby applied for, do not probably exceed the value of $300.00 *Dollars.*

That the names, ages and residence of the heirs at law of the deceased, so far as known to your petitioner, are as follows:

Wilburn Wolfe, over 21 years of age, whose post office
101 address is Kingston, Okla.

That due search and inquiry have been made to ascertain if said deceased left any will and testament, but none has been found, according to the best knowledge, information and belief of your petitioner, said deceased died intestate.

That your petitioner is a friend of said deceased, and therefore, as your petitioner is advised and believes, is entitled to letters of administration of said estate.

All others having failed to make application for letters of administration.

Wherefore, your petitioner prays that a day of court may be appointed for the hearing of this application, that due notice thereof be given by the judge of said court by posting or publishing notices according to law, and that upon said hearing, and the proofs to be adduced, Letters of administration of said estate may be issued to your petitioner, and your petitioner will ever pray, etc.

Dated Jan. 23rd, A. D. 1909.

A. H. CHAPMAN,
Petitioner.

STATE OF OKLAHOMA,
County of Pontotoc, ss:

I, A. H. Chapman, being duly sworn, depose and say, that the foregoing petition by me subscribed is true, to the best of
102 my knowledge, information and belief. So help me God.

A. H. CHAPMAN.

Subscribed and sworn to before me this 23rd day of Jan. A. D. 1909.

JOEL TERRELL,
County Judge.

(Indorsed on back as follows:) No. 708. In County Court, Pontotoc County. Petition for Letters of Administration. In the matter of the estate of Agnes Wolfe, Deceased. Filed Jan. 23rd, 1909. Joel Terrell, Judge of County Court. G. M. King, attorney for Petitioner. 66666. Plaintiff's Ex. "E-2," end of.

103 Mr. Kennamer: The plaintiff now offers in evidence Exhibit "F," being a Warranty Deed from Wilburn Wolfe, to D. R. Johnson, and we also offer as a part of the same Exhibit "F" the Order of approval, order of the County Court approving the deed.

Mr. Ledbetter: The defendant objects to Exhibit "F" the deed, as follows: As it is incompetent, irrelevant and immaterial, in this: That it is shown on the face of the plaintiff's petition *with* Wilburn Wolfe had theretofore conveyed this land to other parties.

By the Court: Overruled.

Mr. Ledbetter: The defendant excepts.

Mr. Ledbetter: As to the purported approval on the back of said

deed by the First Assistant Secretary of the Interior: the defendant objects for the reason it is shown on the face of the plaintiff's petition herein that the lands in controversy herein were sold in 1903, and that the Indian allotte died in1903 and no authority is conferred on the Secretary of Interior to approve such conveyances.

By the Court: Ruling will be reserved at this time; I do not think it is material.

Mr. Ledbetter: The defendant excepts.

Mr. Kennamer: There is the approval of the County Court attached to it any way.

Mr. Ledbetter: The defendant objects to the purported order of the County Court, approving this conveyance, for the following reasons: First. It is not shown that any Letters of Administration have been taken out on the estate of Agnes Wolfe, deceased. Second. That the order on its face shows that the Indian allottee died in 1903, and the County Court of the State would be without authority or jurisdiction to approve a conveyance where the Indian had died prior to April 26, 1906.

104

By the Court: Which is overruled.

Mr. Ledbetter: To which the defendant excepts.

Said plaintiff's exhibit "F," the warranty deed, together with all endorsements and approvals thereon; also the order of the county court approving said deed and all endorsements and certificates thereto attached and endorsed, are in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT "F."

(Indian Case #9.)

Received Jan. 10, 1910. Enclosure to No. 1574.
Received Dec. 6, 1909. Enclosure to No. 66201.
Received Jul- 25, 1910. Union Agency Dept. No. 2246.
Office of Indian Affairs. Received Jan. 1, 1910.

Deed.

STATE OF OKLAHOMA,
County of Marshall:

This Endenture, Made this 4th day of January, 1909, between Wilborn Wolfe of Marshall County, in the State of Oklahoma, of the first part and D. R. Johnson of the second part, Witnesseth, That the party of the first part in consideration of the sum of Two Thousand One Hundred (2100) Dollars, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, and convey unto the party of the second part his heirs and assigns, all the following described real estate situated in the county of Jefferson and State of Oklahoma, to-wit:—

105

The Northeast quarter of the Northwest quarter and Lots One (1) and Two (2) of Section Thirty (30) Township Three (3) South and Range Seven West, and the east half of the Northwest quarter

and the East Twenty (20) acres of Lot 1 and Lot 2 of Section Thirty-one (31), Township Three (3) South and Range Seven (7) West in Jefferson County State of Oklahoma, containing Two Hundred Fifty-three and Eight Hundredths (253.08) acres according to the official survey of the U. S. Government.

To have and to hold the same, Together with all and singular the tenements, and appurtenances thereunto belonging or in any wise appertaining forever.

And said Wilborne Wolf, for his heirs, executors, or administrators, does hereby covenant, promise and agree to and with said party of the second part that at the delivery of these presents he was lawfully seized in his own right of an absolute and indefeasible estate of inheritance, in fee simple, of, in and to all and singular the above granted and described premises, with the appurtenances, that the same are free, clear, discharged and unencumbered of and from all former grants, titles, charges, judgments, taxes, assessments,
106 and encumberances of what nature and kind soever and that he will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against said party of the first part, his heirs and assigns, and all and every person whomsoever lawfully claiming or to claim the same.

In witness whereof, the party of the first part hereunto set his hand the day and year first above written.

WILBURN WOLFE.

STATE OF OKLAHOMA,
County of Pontotoc.

Before me, Maud V. Snead, a Notary Public in and for said county and state on this the 4th day of January, 1909, personally appeared Wilburn Wolfe, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

[SEAL.] MAUD V. SNEAD,
Notary Public.

My commission expires May 11, 1911.

(Endorsed as follows:)

E. B. M. B. D. S.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., Jul- 2, 1910.

The conveyance by Wilborn Wolfe, of his interest as a full-blood Indian heir in and to the within described lands allotted to
107 Agnes Wolfe, a full-blood Chickasaw citizen, Roll No. 347 (who died prior to May 27, 1908), is hereby approved, in

accordance with the provisions of the Act of Congress approved April 26, 1906 (34 Stat. L. 137).

FRANK PIERCE,
First Assistant Secretary of the Interior.
W. E. P.
RY/R.

(Indorsed on back:) 11798. This instrument was filed for record on the 11 day of Oct. A. D. 1910, at 1 P. M. and duly recorded in book 19, on page 541. (Seal.) M. C. Fisher, Register of Deeds, Jefferson Co., Okla. $1.25 paid.

STATE OF OKLAHOMA,
County of Pontotoc:

In the County Court.

In the Matter of the Approval of a Sale of Inherited Lands by WILBURN WOLFE, a Married Man.

Order Approving Deed.

Be it known on this the 23rd day of March, 1909, the application of D. R. Johnson for the approval of a deed executed to him on the fourth day of January 1909 by Wilborn Wolfe brother of
108 Agnes Wolfe deceased, conveying the lands inherited by the said Wilborn Wolfe from the said Agnes Wolfe deceased coming on to be heard:

The court finds that Agnes Wolfe on or about the — day of — month 1903, died in that part of the Indian Territory now comprising part of the County of Pontotoc, Oklahoma and resided in Pontotoc County at the time of her death. That she was a full blood Chickasaw Indian; that she was a single woman at the time of her death leaving as her sole heir Wolbron Wolfe, her brother. And that the said Agnes Wolfe deceased had at the time of her death an allotment of the tribal lands conveyed in said deed and described as follows, to-wit:—

The East ½ of the N. W. ¼ and the East 20 acres of Lot 1 and Lot 2 of Sec. 31, Township 3 South and Range 7 West Chickasaw Nation, and the N. E. ¼ of the N. W. ¼ and Lots 1 and 2 of Sec. 30, Township 3 south, and Range 7 West (Chickasaw Nation in Jefferson County, Oklahoma).

And the court further finds that Wilborn Wolfe is a full-blood Chickasaw Indian and an adult 27 years old, and the consideration of Twenty One Hundred (2100) Dollars paid by the said D. R. Johnson to the said Wilborn Wolfe, as a consideration for the above described land is a fair and adequate consideration for the said lands.

It is therefore ordered and decreed that the said deed executed by Wilborn Wolfe on the fourth day of January 1909 to D. R.

Johnson for the lands herein described be and the same is hereby approved in all respects.

JOEL TERRELL,
County Judge.

109 (Indorsed on back as follows:) #708. 91. In the matter of the estate of Agnes Wolfe, Dec'd. Order approving deed. Filed Mar. 23, 1909. Joel Terrell, County Judge. Pontotoc County, Oklahoma, by T. C. Sims, Clerk. No. Journal 1/362. 554. This instrument was filed for record on the 26th day of Mar. A. D. 1909, at 9 o'clock A. M. and duly recorded in Book 8 Mis. on page 538. N. S. Fisher, Register of Deeds, Jefferson Co., Okla., by H. Treadwell, Dep. 1.00 pd.

Certificate of True Copy.

STATE OF OKLAHOMA,
Pontotoc County, ss:

I, F. C. Sims, Clerk of the County Court, in and for the County and State aforesaid, do certify thar the instrument hereto attached is a full, true and correct copy of an order approving Deed of full blood Indians, In Re estate of Agnes Wolf, Dec'd., as the same now appears of record in this office.

Witness my hand and seal of said court at Ada, Oklahoma, on this 23rd day of M'ch, 1909.

[SEAL.]

F. C. SIMS.
Clerk of the County Court.

110–207 Said Exhibit "F" is indorsed on the back cover thereof as follows: #708. 91. Agnes Wolfe, Deceased. Warranty deed from Wilburne Wolfe to D. R. Johnson. Filed Feb. 23, 1909. Joel Terrell, County Judge, Pontotoc County, Oklahoma, by F. C. Sims, Clerk. F. E. Kennamer, Att'y, Madill, Okla. 5553. This instrument was filed for record on the 26 day of Mar. A. D. 1909, at 9 A. M. and duly recorded in Book 18 Deed on page 447. (Seal.) M. C. Fisher, Register of Deeds, Jefferson Co., Okla., by H. Treadwell, Dep. k.k5 pd.

* * * * * * *

208 And be it remembered that thereafter on the 18th day of September, 1912, there was filed in said cause by the Court, the findings of fact and conclusions of law of the Court. The same being as follows, to-wit:

Findings of fact by the Court being as follows:

In the District Court of Jefferson County, State of Oklahoma, 15th Judicial District.

No. 1826.

D. R. JOHNSTON, Plaintiff,
vs.
C. E. GANNON, Defendant.

Findings of Fact and Conclusions of Law.

Written request having been filed requesting the Court to make findings of Fact and Conclusions of Law, it is submitted and the Court Finds:—

1. That the land in controversy was allotted to one Agnes Wolfe, on the — day of —— 1903, the certificate of Allotment bearing date of July 7, 1903, the date of Patent being signed by the last Governor to sign the same, being September 12, 1905; Date of Approval of the Secretary of the Interior being October 7, 1905.

209 2. The court further finds that Agnes Wolfe, the allottee died on the — day of —— 1903. Letters of Administration over the estate of the said allottee having been issued from the County Court of Pontotoc County, Oklahoma, on the 15th day of February, 1909.

3. The Court further finds that on the 4th day of January, 1909, one Wilburn Wolfe, executed and delivered to D. R. Johnston, the Plaintiff herein, warranty deed for the land in controversy. That said deed was approved by the County Judge of Pontotoc County, Oklahoma, on March 23, 1909. That in the order of approval of said deed it is recited that Wilburn Wolfe was the brother and only heir of said Agnes Wolfe, deceased allottee.

4. It is also admitted in the plaintiff's petition and in the answer of the defendant, that said Wilburn Wolfe is the brother and only heir of the said Agnes Wolfe, and the court so finds that the said Wilburn Wolfe was the brother and only heir of said Agnes Wolfe, deceased allottee.

5. The court further finds that said D. R. Johnston paid to the said Wilburn Wolfe, the sum of $—, as consideration for the Warranty deed from the said Wilburn Wolfe to the said D. R. Johnston.

6. The court further finds that the said Agnes Wolfe was a full blood Chickasaw Indian and that Wilburn Wolfe is a full blood Chickasaw Indian.

210 7. The court further finds that at no time since the execution of the deed to Johnston by the said Wilburn Wolfe, has the said Johnston been in control or possession of the land sued for.

8. The court further finds that on October 13, 1903, for a consideration of $1050.00, said Wilburn Wolfe executed and delivered to one A. J. Waldock, a Warranty Deed for the land sued for in this action.

9. The court further finds that on the 23rd day of October, 1905,

said A. J. Waldock, executed and delivered to the Choctaw Investment Company, for a valuable consideration, a quit claim deed for the lands sued for in this action and further finds that on the 27th day of August, 1906, said A. J. Waldock executed and delivered to the said Choctaw Investment Company a Warranty Deed to the said land sued for.

10. The court further finds that on July 23, 1906, the Choctaw Investment Company, for a good and sufficient consideration, executed and delivered to the Bankers Trust Company, a warranty deed for the lands sued for by the plaintiff herein; and that on the 22nd day of October, 1906, the Bankers Trust Company for a good and valuable consideration, executed and delivered a warranty deed for the lands sued for herein to one Henry E. Wilson and wife, grantors of the defendant C. E. Gannon, herein.

211 11. The court further finds that on November 30th, 1907, said Henry E. Wilson and wife, for a good and valuable consideration, executed and delivered to the defendant C. E. Gannon, warranty deed for the lands in controversy.

12. The court further finds that from the year 1908 said C. E. Gannon through his agents and tenants *have* been in possession and control of said premises, sued for, and *have* received the rents, revenues, profits and emoluments therefrom, except certain sums by reason of litigation accruing out of one lease held by one Addington, is held subject to such litigation.

13. It is stipulated by the plaintiff and defendant herein that for a period of eight years after the passage of Supplemental Treaty between the Choctaw and Chickasaw Nations and the Government of the United States, lands inherited under Sections Twelve and Sixteen of said Supplemental Treaty, were believed to be alienable by the heirs so inheriting the same whether such heirs were fullblood Indians or otherwise, provided such heir died between September 25, 1902, and April 26, 1906. That large sums of money were loaned upon such lands and that there has been invested upon such lands under such titles sums approximating Ten Million Dollars.

14. It is further stipulated and agreed by and between the parties hereto, and the court so finds, that said rulings and contention *was* had and upheld by the Bar of the Chickasaw and Choc-

212 taw Nation, by the Courts of the State of Oklahoma and of the United States Courts in and for the Indian Territory before statehood.

15. The court further finds that — the plaintiff Johnston nor his grantors were in possession of the land in controversy at any time since the year 1903.

16. The court further finds that during the years 1909 and 1910 there were in cultivation upon said premises sixty-five acres of land. The evidence does not disclose nor does the Court find whether such land was on that part of the allotment designated as a Homestead or on that part of the allotment designated as a Surplus.

17. The court further finds that the reasonable rental value of said land during the years 1910 and 1911, was one dollar per acre, per annum.

Conclusions of Law.

1. The evidence in this case does not establish a rule of property while it is true adherence to the doctrine of staredecisis, in a proper case for its application, is undoubtedly necessary to preserve
213 certainty and uniformity and stability and symmetry of our jurisprudence. When the courts of last resort have announced principals affecting the acquisition of title to real estate, and the principals thus announced have been long established, frequently recognized and conformed to, and property rights have been acquired thereunder, such decisions should not and will not be overturned, although the principals announced therein might otherwise be questioned."

But there is no evidence offered nor does the stipulation filed admit that any court of last resort *have* upheld the contentions of the defendant herein, or that such a contention has been held, save by practitioners of the East part of the State of Oklahoma, and the trial Courts of that part of the State. The decision of the District Courts of Oklahoma, from which no appeals were taken, can not be regarded as establishing a rule of property.

2. Defendant holds the land in question under color of title. The Court further finds that the grantee Wilburn Wolfe, is a necessary and proper party in this action, and may join with his grantee in the prosecution of such suit for the use and benefit of such grantee.

3. The court further concludes that that part of the allotment of Agnes Wolfe, designated as a surplus, was inalienable at the time of the execution of the deed to A. J. Waldock.

214 4. The court finds that that part of the allotment of the said Agnes Wolfe, designated as a Homestead, was alienable, without limitations and restrictions at the time of the execution of the deed by Wilburn Wolfe, to A. J. Waldock.

5. The court further finds in this action the plaintiff Wilburn Wolfe is entitled to recover, for the use and benefit of the plaintiff Johnston, that part of the land described in the plaintiff's petition as constituting the surplus allotment of Agnes Wolfe, deceased.

That the defendant herein is entitled to have his title quieted against the plaintiff herein for that part of the land described in the plaintiff's petition constituting the Homestead allotment of Agnes Wolfe, Deceased.

6. The court further finds that there being no evidence showing whether the cultivated lands upon said allotment *was* located upon that part of the lands designated as a homestead or surplus, The plaintiff should take nothing by reason of his claim for rents, and it is so Ordered.

(Endorsed on back as follows:) #1826. D. R. Johnston, Plaintiff, vs. C. E. Gannon, Defendant. Findings of fact and conclusions of law. Filed In Open Court. Sept. 18, 1912. R. F. Brown,
215 Clerk District Court, Jefferson County, Okla.

And be it remembered that on the 18th day of September, A. D. 1912, at the September 1912 term of the said District Court of Jefferson County, Oklahoma, the Court rendered Judgment in said cause. Said Journal Entry of Judgment in said cause, being in words and figures as follows, to-wit:

216 In the District Court, Jefferson County, Oklahoma.

WILBURN WOLFE and D. R. JOHNSTON, Plaintiffs,
vs.
C. E. GANNON, Defendant.

Journal Entry.

Now, on this the 17 day of September, 1912, same being a judicial day of the September 1912, term of this court this cause coming on for rendition of judgment, plaintiffs appear by their attorneys and defendant appears by his attorneys of record.

The court finds that the lands in controversy herein were allotted to Agnes Wolfe who was a full blood member of the Chickasaw Tribe of Indians enrolled on the records of the Dawes Commission as No. 347. That the lands in said allotment which were designed as homestead are described as follows:—

N. E. /4 of N. W. /4 and Lots 1 and 2 of Section 30, Township 3 south, Range 7 West, and that the lands designated as surplus are described as follows:

E. /2 of N. W. /4 and East 20 acres of Lot 1 and Lot 2 of Section 31, Township 3 south, Range 7 West, and that all of said lands were located in Jefferson County, State of Oklahoma.

That said Agnes Wolfe died intestate in the year 1903 and that letters of Administration were issued from the County Court of Pontotoc County, Oklahoma on the 15th day of February, 1906.

That Wilburn Wolfe is the brother and only heir of said

217 Agnes Wolfe and that both Agnes Wolfe and Wilburn Wolfe were full blood member- of the Chickasaw Tribe of Indians.

The court further finds that on October 13th, 1903, for a consideration of $1050.00 said Wilburn Wolfe executed and delivered to one A. J. Waldock a warranty deed to all of the above described land; that on the 23rd day of October 1905 said A. J. Waldock executed and delivered to the Choctaw Investment Company for a valuable consideration a quit claim deed for the lands above described and that on the 27th day of August, 1906 said A. J. Waldock executed and delivered to the said Choctaw Investment Company a warranty deed to said lands; that on July 23rd, 1906, the Choctaw Investment Company, for a valuable consideration executed and delivered to the Banker's Trust Company a warranty deed for said lands and that on the 22nd day of October, 1906 said Banker's Trust Company deeded said lands to one Wilson who on November 30th, 1907, for a valuable consideration executed and delivered to the defendant C. E. Cannon a warranty deed to said lands. The

court further finds that said C. E. Gannon has been in possession and control of said premises since January 1st, 1908 and that the plaintiff Johnston nor Wilborn Wolfe have not been in possession of said lands at any time since the year 1903, nor have they received any rents from said land during said time. That the reasonable rental value of said lands during the year 1910 and 1911 was one dollar per acre per annum.

The court further finds that the deed from Wilburn Wolfe
218 to A. J. Waldock was not approved by the Secretary of the Interior at any time and that on the 4th day of January, 1909, said Wilburn Wolfe made and executed to D. R. Johnston, plaintiff herein, a warranty deed to said described lands which deed was approved by the County Court of Pontotoc County, Oklahoma on March 23rd, 1909; that said D. R. Johnston paid therefor, the sum of $1050.00. The court further finds that said Wilburn Wolfe joins as plaintiff in this suit for the use and benefit of said grantee D. R. Johnston.

The court finds that there has been no rule of property established, maintaining the validity of such titles as that attempted to be conveyed by Wilburn Wolfe to A. J. Waldock; that all those lands above described designated as surplus lands were inalienable at the time of the execution of the deed by Wilburn Wolfe to A. J. Waldock; that said deed was void and of no effect as far as it relates to said surplus lands and that said A. J. Waldock took no title to said lands and that the defendant herein C. E. Gannon obtained no title to said surplus lands by his deed from Wilson; the court further finds that at the time of the execution of the deed from Wilburn Wolfe to A. J. Waldock those lands above described designated as homestead were alienable, without limitations or restrictions and that Waldock obtained a valid indefeasible title to said homestead lands by said deed and that the title of said C. E. Gannon to said lands obtained through said A. J. Waldock is good and valid. That plaintiff Wilburn Wolfe is entitled to recover for the use and
219 benefit of plaintiff D. R. Johnston, said surplus lands and said defendant C. E. Gannon is entitled to have his title to said homestead lands quieted.

It is therefore ordered, adjudged and decreed by the court that the title and possession of said plaintiff D. R. Johnston to the following described lands, to-wit:

East half of northwest quarter (E. /2 of N. W. /4) and East Twenty Acres (E. 20 A.) Lot One (1) and Lot Two (2) of Section thirty-One (31), Township Three (3) South, Range Seven (7) West, Jefferson County, State of Oklahoma, be and the same is hereby forever settled and quieted in the plaintiff D. R. Johnston, as against all claims or demands by the said defendant C. E. Gannon and those claiming or to claim under him and that he and all persons claiming under said C. E. Gannon or A. J. Wadlock be forever barred from setting up or asserting any claim, right or title to said lands; that the deed from Wilburn Wolfe to A. J. Waldock dated October 13th, 1905, in Book 3 Page 3 and the deed from said A. J. Waldock to Choctaw Investment Company dated October

23rd, 1905 recorded in Book 12, page 122, the deed from A. J. Waldock to Choctaw Investment Company dated August 27th, 1906 recorded in Book 13, page 442; the deed from the Choctaw Investment Company to the Banker's Trust Company dated July 23rd, 1906, recorded in Book 13 page 416, the deed from the Banker's Trust Company to Henry E. Wilson recorded in Book 16 page 646 and the deed from said Henry E. Wilson and wife dated No-
220 vember 30th, 1907, recorded in Book 1 at page 454 (all of said book and page numbers, referring to the records of the Register of Deeds of Jefferson County, State of Oklahoma) and all other deeds or documents in said chain of title claimed by defendant C. E. Gannon, be and the same are hereby cancelled, removed, set aside and held for naught as far as same in any way purport to cover or effect or to convey title to said surplus lands above described.

It is further ordered, adjudged and decreed by the court that the title and possession of C. E. Gannon defendant herein to the homestead lands described as follows, to-wit:—

Northeast quarter of Northwest quarter (N. E. /4 of N. W. /4) and Lots One (1) and Two (2) of Section Thirty (30) township three (3) South Range Seven (7) West, Jefferson County, State of Oklahoma, be and the same is hereby forever settled in the defendant C. E. Gannon as against all claims or demands by the said plaintiffs or either of them; that the deed from Wilburn Wolfe to D. R. Johnson dated January 4th, 1909, recorded in book 18 page 447 in the office of the Register of Deeds of Jefferson County, State of Oklahoma, and the order of approval thereof dated March 23rd, 1909, recorded in Book 8 at page 538 in the office of the Register of Deeds of Jefferson County, State of Oklahoma and all other deeds or documents in said chain of title claimed by plaintiffs or either of them are hereby cancelled, set aside and held for naught as any of said deeds or documents refer to or encumber or purport to effect the Homestead lands last above described.

221 It is further ordered, decreed and adjudged that said defendant C. E. Gannon and those claiming through, by or under him by and they are hereby perpetually enjoined and forbidden to claim any right, title, interest or estate in or to said premises heretofore described as surplus lands and quieted in said D. R. Johnston, by virtue of said deeds or either of them hostile or adverse to the possession or title of said plaintiffs and said defendant C. E. Gannon and those claiming under him are hereby perpetually forbidden and enjoined from commencing any suit to disturb the said plaintiffs in their possession, from setting up any claim or interest adverse to the title to said plaintiffs and from disturbing plaintiffs or either *or* them in their peaceable and quiet enjoyment of said described premises.

It is further ordered, decreed and adjudged that said plaintiffs D. R. Johnston and Wilburn Wolfe and those claiming by, through or under them or either of them, be and they are hereby perpetually enjoined and forbidden to claim any right, title interest or estate in or to the lands heretofore described as homestead lands and quieted in said C. E. Gannon, by virtue of said deeds or either of them,

hostile or adverse to the possession or title of said C. E. Gannon and said D. R. Johnston and Wilburn Wolfe and those claiming under them or either of them are hereby perpetually forbidden and enjoined from commencing any suit to disturb the said C. E. Gannon in his possession and title to said Homestead lands, from
222 setting up any claim or interest adverse to the title of said C. E. Gannon herein and from disturbing said C. E. Gannon in the peaceable and quiet enjoyment of said premises.

It is further ordered that each party pay his own costs.

FRANK M. BAILEY, *Judge.*

(Indorsed on back as follows:) No. 1826. D. R. Johnston, et al., Plaintiffs vs. C. E. Gannon, Defendant. Journal entry of Judgement. Filed in open Court, Sep. 18, 1912. R. F. Brown, Clerk District Court Jefferson County, Okla. Recorded in journal No. 3 at page No. —.

223 And, be it remembered that on the 18th day of September, A. D. 1912, the defendant C. E. Gannon, by his attorney H. A. Ledbetter, filed in said cause his Motion for a New Trial, said Motion for a New Trial being in words and figures as follows, to-wit:

In the District Court of Jefferson County, at Waurika, Okla.

D. R. JOHNSTON et al., Plaintiffs,

vs.

C. E. GANNON, Defendant.

Motion for New Trial.

Now comes the defendant and makes this his Motion for new trial herein, and as grounds therefor states the following:

1st. The court erred in conclusions of law, in the following particulars.

A.

The court erred in holding under paragraph one of his conclusions of law filed herein that a rule of property had not been established under the admitted evidence.

224 B.

The court erred in his conclusions of law in paragraph two of his conclusions of law filed herein, in holding that Wilburn Wolfe was a necessary and proper party, and in holding in said paragraph two of his conclusions of law filed herein, that the said D. R. Johnston had a right to join with him, as plaintiff the said Wilburn Wolfe.

C.

The court erred in his third conclusions of law filed herein, wherein, it is held that the surplus allotment of Agnes Wolfe, deceased,

was inalienable by Wilburn Wolfe, her sole heir, and was inalienable at the time of the execution of the deed by Wilburn Wolfe to A. J. Waldock.

D.

The court erred in his fifth conclusion of law filed herein, wherein the court held that Wilburn Wolfe is entitled to receive for the use and benefit of the plaintiff D. R. Johnston that portion of the land known as the surplus land of Agnes Wolfe, deceased.

2nd.

The court erred in refusing to conclude under the law that the deed executed in Jan'y. 1908, by Wilburn Wolfe to the plaintiff, D. R. Johnston was not in violation of the Champerty and Maintenance Statutes of the State of Oklahoma.

225 B.

The court erred in refusing to conclude under the law that the surplus allotment of Agnes Wolfe, deceased, was alienable.

C.

The court erred in refusing to conclude under the law that a rule of property was created as to the Surplus allotment of Agnes Wolfe, deceased.

Third.

The court erred in holding that the surplus allotment of Agnes Wolfe, deceased, was inalienable by Wilburn Wolfe to A. J. Waldock for the reason that at the time of the execution of said deed, the one, three and five years limitation under Section 16, of the Supplemental Treaty of 1902 had not expired.

Fourth.

The judgment of the court entered herein of which the defendant complains as set out herein, is contrary to the law and is contrary to the evidence.

Wherefore, the defendant prays that the judgment so entered herein against this defendant covering the surplus allotment, be set aside and a new trial be granted, for which he will ever pray.

H. A. LEDBETTER,
Att'y for Defendant.

226 (Endorsed on back as follows:) No. 1826. D. R. Johnston, et al. Plaintiffs, vs. C. E. Gannon, Defendants. Motion for New Trial. Bridges & Vertrees and H. A. Ledbetter. Att'ys. for Def't. Filed in Open Court. Sep. 18, 1912. R. F. Brown, Clerk District Court, Jefferson County, Okla.

And be it remembered, that on the 18th day of Septe-ber, A. D. 1912, the Court made an order in said cause overruling the Motion of the defendant for a new trial and granting def-ndant an extension of time within which to prepare and serve a case made in said cause; said Order being in words and figures as follows, to-wit:

227 In the District Court of Jefferson County, State of Oklahoma.

No. 1826.

D. R. JOHNSTON, Plaintiff,
vs.
C. E. GANNON, Defendant.

Order Overruling Motion for New Trial, Granting time for Appeal, etc.

Now on this the 18th day of Sept. 1912, is presented to the court he motion of the defendant C. E. Gannon for a new trial and the ourt after hearing the same and being well and sufficiently advised of the opinion said Motion for a new trial should be overruled. It is therefore ordered, adjudged and decreed by the court that the notion of the defendant be and the same is hereby overruled and nied:

To which action of the court in overruling said motion for a new ial the defendant excepts and prays an appeal to the Supreme ourt, which is granted, and on application of the defendant in open ourt for an extension of time in which to prepare and serve his se made herein, the Court grants Ninety (90) days from this date thin which to serve the same and the Plaintiff allowed ten days suggest amendments to same and case made to be settled and signed by the Court upon five days written notice by either party.

8-238

The defendant C. E. Gannon wishing to supersede judgment of the court rendered herein, asks the court to give h an order which the Court grants, and fixes the bond of the dedant in the sum of $600.00, which is to be filed and approved by Clerk of this court within thirty days from this date, pending making of which execution shall be stayed and after the making the same all process shall be stayed awaiting the decision of the preme Court.

FRANK M. BAILEY,
Judge District Court, 15th District, Oklahoma.

(Endorsed on back as follows:) No. 1826. D. R. Johnston et al., intiffs, vs. C. E. Gannon, Defendant. Order Overruling Motion a New Trial & Granting time for Appeal. Filed In Open Court 18, 1912. R. F. Brown, Clerk District Court, Jefferson County, a. Recorded in Journal No. 2 at Page No. —.

* * * * * * *

239 And thereafter, at the January, 1914, Term of said Supreme Court, on the third day of February, 1914, the following proceeding was had in said cause, to-wit:

4793.

C. E. GANNON, Plaintiff in Error,
v.
D. R. JOHNSTON et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the court below in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the court below in the above cause be, and the same is hereby affirmed.

Opinion by Rosser, J. All the Justices concurring.

Upon Chief Justice Hayes and Justice Williams certifying their disqualification, the Governor appointed Judge Malcolm E. Rosser and Judge J. E. Sharp of the Supreme Court Commission to sit in their places.

240 In the Supreme Court of the State of Oklahoma.

Filed Feb. 3, 1914. W. H. L. Campbell, Clerk.

No. 4793.

C. E. GANNON, Plaintiff in Error,
vs.
D. R. JOHNSTON et al., Defendants in Error.

Syllabus.

1. The restrictions contained in section 16 of the supplemental treaty with the Choctaw and Chickasaw Nations, of one, three and five years, upon alienation of surplus lands of allottees, selected during the life of the allottee ran with the land and prevented the heirs of a deceased allottee of such land from alienating the same before the expiration of said periods.

2. The doctrine of rule of property cannot be applied to render valid conveyances made in violation of governmental policy.

3. Where land in the adverse possession of another is conveyed the grantee may maintain an action in the name of his grantor to recover from the adverse holder.

4. Where the grantee of land, which at the time it was conveyed to him, was in the adverse possession of another, brought suit in his own name to recover it, it was not error to permit him to amend his petition so as to join his grantor as plaintiff.

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Error from District Court, Jefferson County.

Affirmed.

FRANK M. BAILEY, *Judge.*

Action by D. R. Johnston and Wilburn Wolfe against C. E. Gannon. Judgment for the plaintiffs, and defendant brings error.
Bridges & Vertrees, H. A. Ledbetter, for Plaintiff in error.
F. E. Kennamer, Chas. A. Coakley, Cham Jones, Guy Green, for defendants in error.

241 *Opinion by Rosser, J.*

This was an action by D. R. Johnston against C. E. Gannon to recover certain lands which constituted the allotment of Agnes Wolfe. By amended petition Wilburn Wolfe, Johnson's grantor, was joined as plaintiff. Wilburn Wolfe was the sole heir at law of Agnes Wolfe, who selected and took the land in controversy as her allotment, and while the record is not absolutely clear, it is a fair inference from the whole record, and especially from the stipulation hereinafter set forth, that it was filed during her life time. After her death Wilburn Wolfe sold the land to A. J. Waldock for the expressed consideration of $150.00. There was a conflict in the testimony as to whether or not the entire consideration was paid. The deed was dated October 18th, 1903. Gannon claims under a chain of conveyances from Waldock. The plaintiff, Johnston, claims under a deed from Wilburn Wolfe, executed January 4th, 1909. The trial court decided that Wolfe's deed to Waldock was good so far as it attempted to convey the homestead of Agnes Wolfe, but that it was invalid as to the surplus. There was a judgment in favor of the plaintiffs for the surplus allotment. From this judgment the defendant, Gannon, has appealed. It was stipulated between the parties

"that for a period of eight years after the passage of the Supplemental Treaty between the Choctaw and Chickasaw Nations and the United States, lands inherited under Secs. 12 and 16 of said Supplemental Treaty were construed to be alienable by the heirs so inheriting the same, whether they were full blood Indians or otherwise, which construction was given by a majority of the lawyers of the Chickasaw and Choctaw Nation portion of the state of Oklahoma, by the United States Court prior to statehood, the district courts of the State of Oklahoma since statehood, and the Supreme Court of Oklahoma in 103 Pac 566. That loan companies prior to statehood, within and without the Indian Territory, loaned vast amounts of money on such land; that loan companies since statehood have loaned vast amounts of money on such lands. That there has been invested in such lands prior to statehood and since statehood by the farmers and investors approximately $10,000,000.00. That the lands this agreement has reference to *is* lands inherited by Indians under Secs. 12 and 16 of the Supplemental Agreement be-

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tween the Chickasaws and Choctaws and the United States, which became effective September 25th, 1902, wherein the Indian died between September 25, 1902, and April 26, 1906."

242 The defendant Gannon, pleaded not only that the title was in him by reason of his chain of title from Waldock, but also pleaded that the plaintiff could not maintain his action, because at the time he purchased, Gannon and his grantors had been in actual possession of the land for more than one year prior thereto, and that, therefore, the conveyance was champertous.

Plaintiff in error contends, First: That the restrictions of Sec. 16 of the Supplemental Treaty do not follow the land into the hands of the heirs of a deceased allottee. Second: That though the statute might have originally been subject to such construction the facts with reference to the opinions of lawyers and decisions of courts, as set forth in the agreement above quoted, establish a rule of property which would require this court to hold that the lands were not subject to the restrictions in the hands of the heirs. Third: That the sale to Johnston was champertous and that he cannot maintain the action upon that reason.

That portions of the supplemental agreement between the United States and the Choctaw and Chickasaw Indians, approved July 1st, 1906, (32 Stat. L. 641), which are material to the decision in this case, are contained in Secs. 11 and 16 both inclusive, which are as follows:

Sec. 11. "There shall be allotted to each member of the Choctaw and Chickasaw tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred twenty acres of the average allotable land of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw Nations; to conform, as nearly as may be, to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section."

243 Sec. 12. "Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allotable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the life time of the allottee, not exceeding twenty-one years from the date of crtificate of allotment, and separate certificate and patent shall issue for said homestead."

23. "The allotment of each Choctaw and Chickasaw freedman

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shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

14. "When the allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under the rules and regulations and on terms to be prescribed by the Secretary, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribe."

15. "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

16. "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows:—One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent; Provided, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

Section 12 relates solely to the homestead, under its provisions the homestead was inalienable during the life time of the allottee, not exceeding twenty-one years, but upon the death of the allottee could be alienated by the heirs whether the twenty-one years had elapsed or not. This is the plain reading of the statute, and it was so held in Mullen v. United States, 56 L. ed. 839. Section 16 is not so clear. In the first place it is provided not that the land shall be inalienable during a certain period, but that it shall be alienable after the issuance of patent, "one-fourth in acreage in one year, one-fourth in acreage in three years and the balance in five years." But notwithstanding the difference in language the meaning is the same. The statement that land shall be alienable after one, three, and five years is equivalent to saying that it could
244 not be alienated before the expiration of said periods of time.

In the case of Thirty Thousand Land Suits, in re Lands of the Five Civilized Tribes, 199 Fed. 811, Judge Campbell of the Eastern District of Oklahoma, in an opinion which bears the evidence of careful consideration, held that the restrictions on alienation of one, three and five years ran with the land, and affected it in the hands of the heirs as well as of the original allottee, and prohibited alienation by the allottee or his heirs until the expiration of the period mentioned. In that case Judge Campbell analyzed the opinion of Mr. Justice Hughes in the case of Mullen v. United States, 224 U. S. 448, 495, 32 Sup. Ct. 495, 56 L. ed. 839, and came to the conclusion that at the time of rendering that decision "it did not then occur to the court that the one, three and five years restriction attached to the land in the hands of the heirs as well as in the hands

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of the allottee." He bases this conclusion on this view on the effect of the opinion of the Supreme Court upon the fact that it referred to the restriction as contained in the proviso of Section 16. It is possible that his analysis of the decision is correct, but a reading of the entire opinion leaves a different impression upon the writer. It will be noted that Judge Campbell was combatting the theory advanced that Mullen v. United States decided that the restrictions were personal to the allottee. What is said in that opinion with reference to Section 16 is said by way of inducement and leading up to the question of whether or not allotments made under the terms of section 22 of the Supplemental Agreement could be alienated by the heirs of a deceased Indian.

The Court said: "It will be observed that the homestead lands are made inalienable 'during the lifetime of the allottee not exceeding twenty-one years from the date of certificate of allotment.' The period of restriction is thus definitely limited, and the clear implication is that when the prescribed period expired, the lands were to become alienable; that is, by the heirs of the allottee upon his death, or by the allottee himself at the end of twenty-one years. Thus, with respect to homestead lands, the supplemental agreement imposed no restriction upon the alienation by the heirs of
245 a deceased allottee. And the reason may be found in the fact that each member of the tribes—each minor child as well as each adult, duly enrolled as required—was to have his or her allotment; so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent. On the other hand, the proviso of paragraph 16—which relates to the additional portion of the allotment, or the so-called 'surplus' lands—contains a restriction upon the alienation not only by the allottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively."

Proceeding the court considers the question of whether or not there are any restrictions upon land allotted as provided in section 20 of the supplemental agreement. The court refers to the opinion of the Assistant Attorney General for the Interior Department, Van Deventer, (Now of the Supreme Court) in which he held that under the Creek Treaties it was not necessary that a homestead be designated by the land allotted by the heirs of a deceased member of the tribe, and then proceeds:

"We have then a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor one-half of them considered homestead would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16 limiting the right of heirs to sell surplus lands, but on examining the context it appears that his provision is part of the scheme for allotments to living members where there is a segregation of homestead and surplus lands respectively. Whatever the policy of such a

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designation which gives a greater freedom for the disposition by heirs of homestead land than of the additional land there is no warrant for importing it into paragraph 22 where there is no such segregation. It would be manifestly inappropriate to imply the restrictions in such cases so as to make it applicable to all lands taken by the heirs, and there is no occasion or authority for creating a division of the land so as to impose a restriction upon a part of them."

It will be observed upon a reading of the opinion that the question involved was whether the heirs to whom land had been allotted under the provisions of section 22 could sell at all. The question was not presented as to whether they could sell for a particular consideration. but could they sell, and the court, in effect, said, that in a case where lands were taken under the provision of section 16, a different case would have been presented. They did not attempt to limit it to the question of price. The opinion does not say that if the heirs had attempted to sell under the provisions of section 16 that it would have been incumbent upon the
246 purchaser that it pay the appraised value. Nothing of that sort is contained in the opinion, and it is believed that the proper intrepretation of the language of the court is that a restriction as to time applied to land taken as surplus allotment under the provisions of section 16. Of course, the language of the court with reference to section 16 was merely obiter, but obiter of the Supreme Court of the United States upon a question of which it has final jurisdiction in a case which had been so ably argued as the Mullen case, at a time when the court had been considering a number of similar questions, cannot be disregarded by this court.

In the case of Goodrum v. Buffalo, 162 Fed. 817, it was held, affirming the Indian Territory Court of Appeals, (104 S. W. 942), that under the Act of Congress of March 2nd, 1895, which provided that the allotments of the Quapaws should be inalienable for a period of twenty-five years from and after the date of patents, this restriction ran with the land and prevented the heirs, as well as the immediate allottee, from conveying within the prescribed period. It was this decision that Judge Campbell relied upon in case In re Lands of the Five Civilized Tribes, 199 Fed. 811.

In the case of United States v. Aaron, decided by the Circuit Court of the Western District of Oklahoma, 183 Fed. 347, it was held that the provisions of Act of June 28th 1906, (34 Stat. L. 539) with reference to the land of the Osage Tribe of Indians that they shall be inalienable until otherwise provided by Act of Congress, was a restriction running with the land and against alienation, even after the land had descended to the heirs of the allottee.

247 It is with regret that the conclusion is arrived at that the surplus lands were not alienable by the heirs before the expiration of one, three and five years. The doctrine of the rule of property cannot avail the defendant. No rule of property can be built up in the face of the statute where there is a governmental policy involved. The question involved here is not merely a prop-

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erty question between individuals, but there is a governmental policy involved. Hickman v. U. S. 224 U. S. 413, 56 L. ed. 820. It would not be proper to pass over this question of the effect of the rule of property upon the rights of the parties without calling attention to an erroneous statement of fact in the agrement. The agreement refers to the case of Hancock v. Mutual Trust Co., 24 Okla. 391, 103 Pac. 566, as holding that lands such as are involved here could be alienated by the heirs before the expiration of the one, three and five year period. The question involved in Hancock v. Mutual Trust Co., was where lands allotted to the heirs of a member of a tribe who had died before selecting his allotment, as provided by section 22 of the Supplemental Treaty (32 Stat. L. 641) could be alienated. It was held that they could and that view was upheld in the case of Mullen v. United States, 24 U. S. 448, 32 Sup. Ct. 495, 56 L. ed. 834.

The remaining question is as to whether the plaintiff is prevented by the rule against champerty from maintaining this action.

The cases of Houston v. Scott, 20 Okla. 142, 94 Pac. 512; Powers v. Van Dyke, 27 Okla., 27, 111 Pac. 939; and Martin v. Cox, 31 Okla. 543, 122 Pac., 511, establish the rule that a conveyance of real estate in the adverse possession of another, where the grantor has not been in possession receiving the rents and profits within one year, is void as against the person in possession, though good as between the parties. These cases were followed by Judge Campbell of the Eastern District of Oklahoma in the case of Bell v.
248 Cook, 192 Fed. 597, and in Miller v. Fryer, 128 Pac. 713, the rule was applied to a case where the grantor was an allottee whose restrictions had not been removed at the time he placed the adverse holder in possession, and where the adverse holder's deed was absolutely void because the restrictions had not been removed, and this rule was followed in Ruby v. Nunn, 132 Pac. 128.

Those cases, however, are not decisive of this one. In this case the suit was first brought in the name of the grantee, but the petition was afterwards amended and the allottee, Wolfe, was made a party plaintiff. No question of surprise or lack of time to prepare to meet the new party is raised. The question involved here is whether the suit can be maintained in the name of the allottee grantor, and whether it was proper to permit him to be joined as plaintiff after the suit was brought. The suit can be brought in the name of the grantor in all the states where the champertous deed is good between the parties. No authorities to the contrary have been found.

In the case of Thompson v. Richards, 19 Ga. 594, Mr. Justice Lumpkin said:

"It is straining pretty hard perhaps to adopt the 32 Henry VIII into a new country like this has been; and we feel no disposition to relax the rule which allows the grantee, whose deed is made void by that statute, to use the name of his grantor to recover the premises."

In the case of Pearson v. King, 99 Ala. 125, it was held that though such conveyances were void the grantee could bring suit in

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the name of the grantor, and the grantor could not prevent the use of his name for such a purpose. The authorities are reviewed at considerable length in this case. And to the same effect is Coogler v. Rogers, 25 Fla. 853; Edwards v. Pankhurst, 21 Vt. 473; Hamilton v. Wright, 37 N. Y. 502; Steeple v. Downing, 16 Ind. 478; See also McMahan v. Bowe, 114 Mass. 140; Galbraith v. Payne, 12 N. D. 164. In North Carolina the statute specially permits the bringing of an action in the name of the grantor.

249 Upon Chief Justice Hayes and Justice Williams certifying their disqualification, the Governor appointed Judge Malcolm E. Roeser and Judge J. F. Sharp of the Supreme Court Commission to sit in their places.

The judgment of the court below is affirmed; all the Justices concurring.

250 Filed Feb. 9, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma, at Oklahoma City.

No. 4793.

C. E. GANNON, Plaintiff in Error,
v.
D. R. JOHNSTON et al., Defendants in Error.

Motion for Rehearing.

Now comes the plaintiff in error, C. E. Gannon, and makes this his motion for rehearing herein, and as grounds therefor, states the following:

First. Because the court in rendering its decision has overlooked a controlling decision on the question involved, the decision being that of Mullen et al. v. United States, 224 U. S. 448, wherein it was said, "And any contention that the conveyances were invalid, solely because they were made before the issuance of patent—the land not being under restriction, would be met by the proviso contained in section 19 of the Act of April 26th, 1906 (34 Stat. L. 144, chap. 1876): "Provided further, that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment, and subsequent to removal of restriction where patents thereafter issue, shall not be deemed or held invalid, solely because made prior ro issuance and recording or delivery of patent or deed, *and* etc."

While the above language in its terms only applies to members of the tribe, the court said that it applied to heirs, who might or might not be members of the tribe. If it was brought forward before the Supreme Court of the United States that the above quoted act only applied to members of the tribe, and we cannot say that it was not, we cannot help but feel that the Honorable Justice in rendering the opinion in the case at bar oberlooked this controlling decision, the same not having been mentioned in the opinion.

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251 In our opinion the above quoted statute was passed just to cure such cases as the one at bar, and why it should apply in the Mullen-Janson cases and not apply to the case at bar, would in our judgment be a strange construction. Justice Hughes in rendering the Mullen-Janson opinion said that the only obstacle in the way, was the proviso in section 16, but explains this away, by saying that the individual allottee already had his homestead and already had his surplus, and by reason of which, there was no reason for importing the restrictions contained in section 16 of the Treaty of 1902 into paragraph 22. Paragraph 22 was merely the vehicle that carried the land through Chapter 49 of Mansfield Digest to the heirs, and if the heirs in the case at bar got the land through Chapter 49 of Mansfield Digest, the same analogy of Justice Hughes would in our judgment apply to the case at bar. Assuming, but not admitting that the Indian died after selection. Let us illustrate just a moment. "If two children are allotted land the same day, one filed by administrator and the other by guardian, and just after the selection and the same day the second child would die; there could be no reason for saying that the surplus in the first instance was alienable and in the second, inalienable." Both children having died the same day, their estates, so far as the right to alienate by the heirs having been inherited under the same law, must necessarily be governed by the same law.

Second. The court in its decision used the following language: "It would not be proper to pass over the question of the effect of the rule of property upon the rights of the parties without calling attention to an erroneous statement of fact in the agreement."

In the presentation of this case in our briefs, it was our contention then and it is our contention now, that nowhere in the record is there any evidence to show whether the Indian died before or after selection. In our oral argument of this case, it was our con-

252 tention that the record did not disclose when the Indian died, but that by a fair inference, it is shown that the Indian died before selection, for it was agreed between the parties that such land as — involved in this suit was alienable as construed by the majority of the lawyers over the state, by the courts before statehood and after statehood and as held in the case of Hancock v. Mutual Trust Co. in 103 Pac. 566. The parties might not have intended to agree that this case and the Hancock-Mutual Trust Company case was the same, but never-the-less, this agreement is in the record, and we hardly feel that this court could conclude that it was an erroneous agreement, and by reason of which, we say that the court has misconstrued this agreement. We again invite the attention of the court to this agreement.—See case made 151.

The exact language being as follows: "That for a period of eight years after the passage of the Supplemental Treaty between the Chickasaws and Choctaws and the United States, lands inherited under sections 12 and 16 of said Supplemental Treaty were construed to be alienable by the heirs so inheriting the same whether they were full blood Indians or otherwise, which construction was by a majority of the lawyers of the Chickasaw and Choctaw Nations of the State

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Oklahoma, by the United States Court prior to statehood, the district courts of the State of Oklahoma since statehood and the Supreme Court of the State of Oklahoma in 103 Pac. 566."

Section 12 of this stipulation merely referred to the land as the "homestead" and Section 16 the "Surplus." The holding of the courts both before and after statehood on the question involved, as was construed in 103 Pac. 566, showing if the court please, that it was the same character of land as that involved in the Hancock-Mutual Trust Company case.

We challenge counsel to show anywhere in the record, that the Indian died after selection. We have been unable to find the evidence in the record and the trial court did not find on this point.

We feel then that by a fair inference from the agreement found on page 151 of the case made, that the Indian died before selection, as counsel agreed that the identical question in this record
253 was the same as in the Hancock-Mutual Trust Company case.

Third. The 15th finding of fact, case made page 195, shows that — Johnston nor his grantors have been in possession of the land since 1903. On page 3 of the case made it is shown that the suit was filed August 14th, 1911. The record shows a continuous quiet and peaceable possession since the original purchase in the fall of 1903. The finding of fact by the trial court that the defendants in error have been out of possession for more than seven years prior to the filing of the suit, plaintiffs cause of action was barred by the Statute of Limitation, section 4471 of Mansfield Digest, which Statute of Arkansas was carried over into the State by schedule I of the Constitution. While it was not specifically mentioned that the right to maintain the suit was barred by the Statute supra, it was pleaded by the plaintiff in error, defendant below, that he and his grantors had been in the continuous possession since the original purchase in the fall of 1913. The motion for new trial filed in the trial court and errors assigned in this court, we believe sufficient to raise this question of limitation at this time, and if a rehearing be granted, we believe that we will be able to convince the court of the law on this question, distinguishing if you please, the limitation as to personal actions and real action. If the limitation as to real actions, is a right, then the schedule to the Constitution carried this right over, and the Arkansas Statute of Limitation applied and not the Oklahoma Statute of Limitation. As was said In re U. S. v. Chandler-Dunbar Water Power Co. 209 U. S. 448 (52 Law Ed. 881) "But Statutes of Limitations, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to effect the right, even in terms only directed against the remedy."
254 See also Campbell vs. Holt, 115 U. S. 620 (29 Law Ed. 483). If a rehearing be granted us, we feel that there will be but little trouble in convincing the court of the correctness of our position.

We respectfully submit upon the whole, that a rehearing should be granted and that this cause be reassigned for oral argument.

Respectfully submitted,

H. A. LEDBETTER,
Atty for Pl'ff in Error.

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255 Filed Feb. 25, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma, at Oklahoma City.

C. E. GANNON, Plaintiff in Error,

vs.

D. R. JOHNSTON et al., Defendants in Error.

Reply to Motion for Rehearing.

It is contended by the Plaintiff in Error in his Motion for a Rehearing that the record in this cause does not disclose whether the lands in controversy were allotted to the allottee during her lifetime, and we desire to call the Court's attention to the testimony of Wilburn Wolfe, which is as follows:

"I sold my sister, Agnes Wolfe, whole allotment of land" (C. M., p. 94).

Which testimony clearly shows that the lands were allotted during the lifetime of Agnes Wolfe, the allottee, and especially in view of the testimony found on page 90, C. M., which is as follows:

"And that the said Agnes Wolft, deceased, had at the time of her death an allotment of the tribal land conveyed in said deed

256 and described as follows."

The above quotation is from the order of confirmation made by the County Court of Pontotoc County, approving the deed executed by Wilburn Wolfe to D. R. Johnson, which order of confirmation was introduced in evidence, and shows conclusively that the lands had been allotted to Agnes Wolfe during her lifetime, and the Trial Court in his first sentence of his finding of fact, uses the following language:

"That the land in controversy was allotted to one, Agnes Wolfe" (C. M., p. 191).

The statement by attorneys for the Plaintiff in Error that the agreed Statement of Facts introduced in evidence was to the effect that the lands in controversy were of the same class of lands as were before the Court in the case of Hancock vs. Mutual Trust Company, cannot be sustained by the record, for the reason the lands referred to in the agreed Statement of Facts were lands allotted under Sections 12 and 16 of the Supplemental Treaty, and no reference to land allotted under Section 22 was made. The agreed Statement of Facts was made for the purpose of saving the Plaintiff in Error from burdening the record with a lot of testimony to support his rule of property theory of the case, it being the contention of the Defendants in Error that if everything in the agreed Statement of Facts were true, no rule of property had been proven in this case.

The Plaintiff in Error now contends that he is entitled to plead the Statute of Limitation in this action, which question has never before been raised until the Motion for Rehearing was filed.

257 We submit that it is an elementary proposition of law that the Statute of Limitation to be available as a defense must be pleaded.

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Authorities.

Ross vs. Saylor, 104, p. 864.
Brown vs. Bell, 103, p. 380.

We further submit that in this case that if the Statute of Limitation had been plead, that it would not be available as a defense for the reason that this being an Indian title, and the power being in the United States to regulate the mode of conveyance of restricted lands, that such conveyances are independent of State Statutes, and the paramount Federal law controlling the method by which Indian heirs could alienate this class of land, no grantee of a void deed could invoke the law of estoppel or any State Statute of limitation. And in the case of Schrimpscher vs. Stockon the Supreme Court of the United States held that where a deed was made during the period of restriction, that the Statute of Limitation did not commence to run until all restrictions under the treaty were removed.

Authorities.

Schrimpscher vs. Stockton, 183 U. S., 290.
McGannon vs. Straightlege, 4 Pac., 1042 (Kans.).
Sheldon vs. Donohoe, 19 Pac., 901 (Kansas).

The Defendants in Error submit that the Statute of Limitation may be changed from time to time without infringing upon any vested right, for the reason the weight of authority is to the effect that no vested right can be based upon the Statute of Limitation.

Statutes prescribing the time within which actions may be brought relate to the remedy, and it is no objection if they are made to operate retrospectively as to existing rights of action, provided the prescribed period within which action may be brought is not so short as to amount to a destruction of the right itself.

Authorities.

Geo. S. Wheeler vs. Theodore F. Jackson, 34 Law Ed., U. S., 659.
Edwards vs. McCaddon, 20 Lowa, 520.

The statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed while the old statute was in force, and before the suit is brought, in which case the suit is barred. Marsdon vs. Seabury, 3 N. J. L., 275.

We respectfully submit that the decision of the Court in this cause is supported by the best authority upon the questions in controversy, and that the petition for a rehearing should be denied.

Respectfully submitted,

F. E. KENNAMER,
CHAS. A. COAKLEY,
GUY GREEN,
CHAM JONES,
Attorneys for the Defendant in Error.

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259 And thereafter, at the April 1914, Term of said Court, o
the 28th day of April, 1914, the following proceeding was ha
in said cause, to wit:

4793.

C. E. GANNON, Plaintiff in Error,
v.
D. R. JOHNSTON et al., Defendants in Error.

And now on this day it is ordered by the court that the petition fo
rehearing filed herein, be, and the same is hereby denied.

260 In the Supreme Court of the State of Oklahoma.

Certificate.

I, Wm. M. Franklin, Clerk of the Supreme Court of the State o
Oklahoma, do hereby certify that the foregoing 259 pages, numbere
from 1 to 259, both inclusive, are a full, true and complete transcri
of the record and all proceedings in said Supreme Court in cause N
4793, C. E. Cannon, Plaintiff in error, vs. D. R. Johnston and Wi
burn Wolfe, Defendants in error, as the same remain on file and
record in my office.

In witness whereof, I hereto set my hand and affix the seal of sa
Supreme Court, at Oklahoma City, Oklahoma, this 30th day o
April, 1915.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,
Clerk Supreme Court of the State of Oklahoma.

261 In the Supreme Court of the United States, at Washingto
D. C.

C. E. GANNON, Plaintiff in Error,
v.
D. R. JOHNSTON and WILBURN WOLFE, Defendants in Error.

Notice.

To D. R. Johnston and Wilburn Wolfe, and to Messrs. Kennamer &
Coakley, and Jones & Green, Attorneys of Record for D. R. John
ton and Wilburn Wolfe:

You will please take notice that the plaintiff in error, C. E. Ga
non, will present to the Clerk of the Supreme Court of the Unite
States, as is provided for by Rule 10, Section 9 thereof, all and si
gular, those parts of the transcript now on file with the Clerk of th
Supreme Court of the United States, and more particularly describ
as follows, to-wit:

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First. Return to Writ of Error;
Second. Citation and Acknowledgement;
Third. Petition for Writ of Error;
Fourth. Assignment of Errors shown in the Transcript, and wherein the plaintiff in error will insist that the Honorable Supreme Court of the State of Oklahoma erred in holding:

(*a*) That the restrictions contained in Section 16 of the Supplemental Treaty with the Choctaw and Chickasaw Nations (Act of July 1st, 1902, c. 1362, 32 Stats., 643) of one, three and five years upon alienation of surplus lands of allottees, selected during the life time of the allottee, ran with the land, and prevented the
262 heirs of a deceased allottee of such land from alienating the same before the expiration of such period; and,

(*b*) That the Honorable Supreme Court of the State of Oklahoma erred in holding that the doctrine of Rule of Property cannot be applied to render valid conveyances made in violation of governmental policy; and,

(*c*) That the Honorable Supreme Court of the State of Oklahoma erred in holding that where land in the adverse possession of another is conveyed the grantee may maintain an action in the name of his grantor to recover from the adverse holder; and,

(*d*) That the Honorable Supreme Court of the State of Oklahoma erred in holding that where the grantee of land which, at the time it was conveyed to him, was in the adverse possession of another, brought suit in his own name to recover it, it was not error to permit him to amend his petition so as to join his grantor as plaintiff; and,

(*e*) That the Honorable Supreme Court of the State of Oklahoma erred in refusing to hold that Wilburn Wolfe, the sole heir at law of Agnes Wolfe, deceased, had a lawful right to alienate the east-half (E. ½) of the northwest quarter (N. W. ¼), and the east twenty (20) acres of Lots 1 and 2, of Section 31, Township 3 South, Range 7 West, for the reason that such land was inherited by him, the said Wilburn Wolfe, under Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, and the Government's appraised value having been paid for the same, there were no restrictions against the right of alienation of said land contained in the treaties between the Choctaws and Chickasaws and the United States;

Fifth. Order fixing Bond;
Sixth. Writ of Error;
Seventh. Bond on Writ of Error;
263 Eighth. Amended Petition of the Defendants in Error, filed in the trial court, and Exhibits thereto Attached;
Ninth. Demurrer of Plaintiff in Error to the Amended Petition;
Tenth. Order Overruling said Demurrer;
Eleventh. Amended Answer and Cross-Petition filed by the Plaintiff in Error in the Trial Court, and exhibits thereto attached;
Twelfth. Reply of Defendants in Error to the Amended Answer and Cross-Petition;
Thirteenth. Agreement and Stipulation of the parties to the above styled cause, wherein it was agreed that for eight years prior to the filing of the suit in the trial court ten millions of dollars had

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been invested in such lands as those involved herein, and that such investments were made by farmers, loan companies within the state and loan companies out of the state; that the lawyers had universally construed Section 16, holding that such lands were alienable; that the trial courts prior to statehood and since statehood had construed Section 16, holding that said lands were alienable, and by the Supreme Court of the State of Oklahoma in the case of Hancock vs. Mutual Trust Company, 103 Pac., page 566;

Fourteenth. Findings of Fact and Conclusions of Law of the Trial Court;

Fifteenth: Journal Entry of Judgment;

Sixteenth. Motion for New Trial filed in the Trial Court;

Seventeenth. Order of Trial Court overruling Motion for
264 New Trial;

Eighteenth. Petition in Error in the State Supreme Court;

Nineteenth. Journal Entry Affirming case in the State Supreme Court;

Twentieth. Decision of the State Supreme Court;

Twenty-first. Motion for Re-Hearing in the State Supreme Court;

Twenty-second. Reply to Motion for Re-Hearing in the State Supreme Court;

Twenty-third. Journal Entry denying Petition for Re-Hearing in the State Supreme Court;

Twenty-fourth. Certificate of Clerk of State Supreme Court.

Which said parts of the transcript enumerated, and the matters and things therein set out, the plaintiff in error will ask to have printed by the Clerk of the Supreme Court of the United States as constituting the record and the assignments of error on which the plaintiff in error will rely.

C. E. GANNON,
By H. A. LEDBETTER,
His Attorney of Record.

Service of above is this the 20th of July, 1915, accepted.

KENNAMER & COAKLEY,
JONES & GREEN,
Attys for Defendants in Error.

265 [Endorsed:] 470—15/24736. No. —. C. E. Gannon vs. D. R. Johnston et al. Notice of parts of record desired to have printed by plaintiff in error and acceptance of service thereof. H. A. Ledbetter, Att'y for Pl'ff in Error.

[Endorsed:] File No. 24736. Supreme Court U. S., October term, 1915. Term No. 470. C. E. Gannon, Pl'ff in Error, vs. D. R. Johnston et al. Assignment of errors and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed July 24, 1915.

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266 In the Supreme Court of the United States, at Washington, D. C.

C. E. GANNON, Plaintiff in Error,
vs.
D. R. JOHNSTON and WILBURN WOLFE, Defendants in Error.

Suggestion for Additional Parts of Record to be Printed.

To the Clerk of the Supreme Court of the United States:

Comes now, the Defendants in Error D. R. Johnston and Wilburn Wolfe, and respectfully request that you cause to be printed as part of the record in the above styled action, the following parts of the transcript of the record in addition to that suggested by the Plaintiff in Error to-wit:

All the testimony found in the transcript herein commencing with page 62 to 91 inclusive.

A. C. CRUCE,
F. E. KENNAMER AND
C. A. COAKLEY,
Attorneys for Defendants in Error.

267 [Endorsed:] 470/24736. In the Supreme Court of the United States, at Washington, D. C. C. E. Gannon, Plaintiff in Error, vs. D. R. Johnston & Wilburn Wolfe, Defendants in Error. Suggestion for additional parts of record to be printed.

268 [Endorsed:] File No. 24736. Supreme Court U. S., October term, 1915. Term No. 470. C. E. Gannon, Pl'ff in Error, vs. D. R. Johnston and Wilburn Wolfe. Designation by defendant in error of additional parts of record to be printed. Filed September 30, 1915.

Endorsed on cover: File No. 24,736. Oklahoma Supreme Court. Term No. 470. C. E. Gannon, plaintiff in error, vs. D. R. Johnston and Wilborn Wolfe. Filed May 18th, 1915. File No. 24,736.

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FILED
AUG 23 1916
JAMES D. MAHER
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

C. E. GANNON,
Plaintiff in Error.

vs.

D. R. JOHNSTON AND WILBURN WOLFE,
Defendants in Error.

131
No. [illegible].

BRIEF OF PLAINTIFF IN ERROR.

H. A. LEDBETTER
and
F. M. ADAMS, of Ardmore, Oklahoma.
and
D. M. BRIDGES
and
JOHN VERTREES, of Waurika, Oklahoma.
Attorneys for Plaintiff in Error.

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IN THE
SUPREME COURT OF THE UNITED STATES

C. E. GANNON,
Plaintiff in Error.

vs. No. 470.

D. R. JOHNSTON AND WILBURN WOLFE,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This case comes to this court on writ of error to a judgment of the Supreme Court of the State of Oklahoma, affirming the judgment of the District Court of Jefferson County, Oklahoma, which judgment had cancelled a deed executed by Wilburn Wolfe, a member of the Chickasaw Tribe of Indians, to the plaintiff in error. The plaintiff in error in this court was defendant in the trial court and plaintiff in error in the Supreme Court of the State of Oklahoma. The defendants in error here were the plaintiffs in the trial court and defendants in error in the Supreme Court of the State of Oklahoma. For the purpose of simplifying the statement of the cause, the plaintiff in error in this Court will be referred to as the plaintiff, and the defendants in error as defendants.

The case was submitted to the trial court upon an amended petition, a demurrer thereto, amended answer and cross petition and reply thereto, evidence of witnesses and exhibits introduced in evidence.

The controversy involves the title to the E½ NW¼ and the East 20 acres of Lot 1, and Lot 2 of Section 31, Township 3 South, Range 7 West, of the Indian Base and Meridian, containing 137.78 acres. The titles of each of the parties litigants is deraigned through Wilburn Wolfe, a Chickasaw Indian who inherited the land from his deceased sister in the year 1903. The facts in relation to the controversy, as set out in the amended petition, are as follows:

That the lands in controversy were allotted during the year 1903 to Agnes Wolfe, a full blood Chickasaw Indian who died during the year 1903, leaving surviving as her sole and only heir, Wilburn Wolfe, a full blood Chickasaw Indian.

It is then alleged that Wilburn Wolfe conveyed to D. R. Johnston, by warranty deed, as of date the 4th day of January, 1909, the land in controversy, which deed was thereafter approved by the county court of Pontotoc County, Oklahoma, and afterwards approved by the Secretary of the Interior, which deed and orders approving same were recorded in the office of the register of deeds wherein the land is situated.

It is then alleged that the plaintiff claims title to said land by deed of conveyance from Henry E. Wilson dated November 30th, 1907, and recorded in the office of the register of deeds wherein the land is situated, April 3rd, 1908, that said deed from Henry E. Wilson to the plaintiff is void

for the reason that the said Henry E. Wilson had no title to said land and that no title passed to said plaintiff for the reason that the said Henry E. Wilson purchased said land from the Bankers Trust Company, who in turn purchased said land from the Choctaw Investment Company, who in turn purchased said land from A. J. Waldock, who in turn purchased said land from Wilburn Wolfe; it is further alleged that Wilburn Wolfe had no right to convey said land for the reason that the same was restricted in his hands, and that said deed was executed in violation of the Treaties between the Chickasaws and Choctaws and the United States, and the Acts of Congress.

It is then alleged that D. R. Johnston has the legal title to said land, and that he is entitled to the possession of the same.

Wilburn Wolfe was made a party plaintiff in the trial court, and the suit was prosecuted in his name for the use and benefit of his co-plaintiff, D. R. Johnston, wherein it is asked that the conveyances under which plaintiff asserts his title be cancelled, that the title of D. R. Johnston be quieted and that possession of the land be delivered to the said D. R. Johnston. The amended petition is shown commencing on page 15 of the transcript.

A demurrer was interposed by plaintiff to this amended petition, which demurrer was over ruled. See transcript page 19.

The plaintiff filed his amended answer and cross petition, wherein he says that the land in controversy was allotted to and in the name of Agnes Wolfe, a Chickasaw Indian, and after the allotment was made, Wilburn Wolfe,

the sole and only heir of Agnes Wolfe deceased, made, executed, acknowledged and delivered his warranty deed to said lands to A. J. Waldock, the consideration therefor, being $1050.00, and that A. J. Waldock immediately went into possession of the land; that thereafter, and on the 23rd day of October, 1905, A. J. Waldock conveyed by warranty deed the land in controversy to the Choctaw Investment Company who immediately went into possession of the land; that thereafter, the Choctaw Investment Company conveyed said land to the Bankers Trust Company, who immediately went into possession of said land; that thereafter the Bankers Trust Company, conveyed said land by warranty deed to Henry E. Wilson, who immediately went into possession of the land, and that thereafter, Henry E. Wilson conveyed by warranty deed said land to C. E. Gannon, plaintiff, who immediately went into possession of the land; that all of the conveyances were regularly recorded in the office of the register of deeds wherein the land is situated. It was further alleged in the amended answer and cross petition, that the plaintiff and his grantors had been in the exclusive possession of said land since the purchase by A. J. Waldock in October, 1903, and that the defendants had not been in possession of said land since said sale so made by the said Wilburn Wolfe to the said Waldock in October, 1903, nor had the defendants received the rents and profits arising from said land since October, 1903.

It is then alleged that the deed of record from Wilburn Wolfe to D. R. Johnston was made in violation of the Champerty and Maintenance Statutes of the State of Oklahoma, and that the appearance of same of record impairs

the value of plaintiffs said title and constitutes a cloud on his title.

It is then alleged, that by the construction given by a majority of lawyers of the Indian Territory, that such land was alienable, a vast amount of money was invested in such land by farmers and investors; that the United States judges in the Indian Territory, gave as their judgment, that such land was alienable and by reason of which a vast amount of money was invested in such land; that since Oklahoma was admitted into the Union it was a universal construction by a majority of the lawyers that such land was alienable, and that by reason thereof, a vast amount of money was invested in such land by the farmers and investors; that since Oklahoma was admitted into the Union it was universally held by the courts of the state that such land was alienable and that by reason thereof, a vast amount of money was invested by the farmers and investors; that on the 13th of July, 1909, the Supreme Court of Oklahoma, in the case of Francis Hancock, et al vs. the Mutual Trust Company, 108 Pac. 566, held such land to be alienable and that by reason of which decision, a vast amount of money was invested in such land by the farmers and investors; that by reason of the universal construction aforesaid, Loan Companies within and without the state of Oklahoma loaned vast amounts of money on such land, and which universal construction had been received for a period of eight years, and that by reason thereof, $10,000,000.00 had been invested in such land.

It is then alleged, that if by a technical construction, it should be held that such land so inherited by Wilburn Wolfe, was restricted when he executed his deed to A. J.

Waldock in October, 1903, that by reason of the universal construction by the lawyers and the courts of the country, by which $10,000,000.00 had been invested in such land, that a rule of property had been established as to such land so inherited by the said Wilburn Wolfe and so conveyed by him to A. J. Waldock in October, 1903.

The plaintiff asked that the defendants take nothing by their said amended petition, that the conveyance executed by Wilburn Wolfe to D. R. Johnston be cancelled and that plaintiffs title to said land be quieted. (See transcript page 20.)

The defendants filed their reply, which in form is a general denial. (See transcript page 25).

A trial was had upon the pleadings as stated, and the trial court made the following findings of facts and conclusions of law to-wit:

D. R. JOHNSTON, Plaintiff,

VS.

G. E. GANNON, Defendant.

Findings of Fact and Conclusions of Law.

Written request having been filed requesting the Court to make findings of Fact and Conclusions of Law, it is submitted and the Court Finds:—

1. That the land in controversy was allotted to one Agnes Wolfe, on the—day of——1903, the certificate of Allotment bearing date of July 7, 1903, the date of Patent being signed by the last Governor to sign the same, being September 12, 1905; Date of approval of the Secretary of the Interior being October 7, 1905.

2. The court further finds that Agnes Wolfe, the

allottee died on the—day of——1903, Letters of Administration over the estate of the said allottee having been issued from the County Court of Pontotoc County, Oklahoma, on the 15th day of February, 1909.

3. The Court further finds that on the 4th day of January, 1909, one Wilburn Wolfe, executed and delivered to D. R. Johnston, the Plaintiff herein, warranty deed for the land in controversy. That said deed was approved by the County Judge of Pontotoc County, Oklahoma, on March 23, 1909. That in the order of approval of said deed it is recited that Wilburn Wolfe was the brother and only heir of said Agnes Wolfe, deceased allottee.

4. It is also admitted in the plaintiff's petition and in the answer of the defendant, that said Wilburn Wolfe is the brother and only heir of the said Agnes Wolfe, and the court so finds that the said Wilburn Wolfe was the brother and only heir of said Agnes Wolfe, deceased allottee.

5. The court further finds that said D. R. Johnston paid to the said Wilburn Wolfe, the sum of $— as consideration for the Warranty deed from the said Wilburn Wolfe to the said D. R. Johnston.

6. The court further finds that the said Agnes Wolfe was a full blood Chickasaw Indian and that Wilburn Wolfe is a full blood Chickasaw Indian.

7. The court further finds that at no time since the execution of the deed to Johnston by the said Wilburn Wolfe, has the said Johnston been in control or possession of the land sued for.

8. The court further finds that on October 13, 1903, for a consideration of $1050.00, said Wilburn Wolfe executed and delivered to one A. J. Waldock, a Warranty Deed for the land sued for in this action.

9. The court further finds that on the 23rd day of October, 1905, said A. J. Waldock, executed and delivered to the Choctaw Investment Company, for a valuable consideration, a quit claim deed for the lands sued for in this action and further finds that on the 27th day of August, 1906, said A. J. Waldock executed and delivered to the said Choctaw Investment Company a Warranty Deed to the said land sued for.

10. The court further finds that on July 23, 1906, the Choctaw Investment Company, for a good and sufficient consideration, executed and delivered to the Bankers Trust Company, a warranty deed for the lands sued for by the plaintiff herein; and that on the 22nd day of October, 1906, the Bankers Trust Company for a good and valuable consideration, executed and delivered a warranty deed for the lands sued for herein to one Henry E. Wilson and wife, grantors of the defendant C. E. Gannon, herein.

11. The court further finds that on November 30th, 1907, said Henry E. Wilson and wife, for a good and valuable consideration, executed and delivered to the defendant C. E. Gannon, warranty deed for the lands in controversy.

12. The court further finds that from the year 1908 said C. E. Gannon through his agents and tenants *have* been in possession and control of said premises, sued for, and *have* received the rents, revenues, profits and emoluments therefrom, except certain sums by reason of litigation accruing out of one lease held by one Addington, is held subject to such litigation.

13. It is stipulated by the plaintiff and defendant herein that for a period of eight years after the passage of Supplemental Treaty between the Choc-

taw and Chickasaw Nations and the Government of the United States, lands inherited under Sections Twelve and Sixteen of said Supplemental Treaty, were believed to be alienable by the heirs so inheriting the same whether such heirs were fullblood Indians or otherwise, provided such heir died between September 25, 1902, and April 26, 1906. That large sums of money were loaned upon such lands and that there has been invested upon such lands under such titles sums approximating Ten Million Dollars.

14. It is further stipulated and agreed by and between the parties hereto, and the court so finds, that said rulings and contention *was* had and upheld by the Bar of the Chickasaw and Choctaw Nation, by the Courts of the State of Oklahoma and of the United States Courts in and for the Indian Territory before statehood.

15. The court further finds that—the plaintiff Johnston nor his grantors were in possession of the land in controversy at any time since the year 1903.

16. The court further finds that during the years 1909 and 1910, there were in cultivation upon said premises sixty-five acres of land.

The evidence does not disclose nor does the Court find whether such land was on that part of the allotment designated as a Homestead or on that part of the allotment designated as a Surplus.

17. The court further finds that the reasonable rental value of said land during the years 1910 and 1911, was one dollar per acre, per annum.

Conclusions of Law.

1. The evidence in this case does not establish a rule of property which is a true adherence to the doctrine of staredecisis. In a proper case for its ap-

plication, is undoubtedly necessary to preserve certainty and uniformity and stability and symmetry of our jurisprudence. When the courts of last resort have announced principles affecting the acquisition of title to real estate, and the principles as thus announced have been long established, frequently recognized and conformed to, and property rights have been acquired thereunder, such decisions should not and will not be overturned, although the principles announced therein might otherwise be questioned."

But there is no evidence offered nor does the stipulation filed admit that any court of last resort has upheld the contentions of the defendant herein, or that such a contention has been held, save by practitioners of the East part of the State of Oklahoma, and the trial Courts of that part of the State. The decision of the District Courts of Oklahoma, from which no appeals were taken, can not be regarded as establishing a rule of property.

2. Defendant holds the land in question under color of title. The Court further finds that the grantee Wilburn Wolfe, is a necessary and proper party in this action, and may join with his grantee in the prosecution of such suit for the use and benefit of such grantee.

3. The court further concludes that that part of the allotment of Agnes Wolfe, designated as a surplus, was inalienable at the time of the execution of the deed to A. J. Waldock.

4. The court finds that that part of the allotment of the said Agnes Wolfe, designated as a Homestead, was alienable, without limitations and restrictions at the time of the execution of the deed by Wilburn Wolfe, to A. J. Waldock.

5. The court further finds in this action the plaintiff Wilburn Wolfe is entitled to recover, for the use and benefit of the plaintiff Johnston, that part of the land described in the plaintiff's petition as constituting the surplus allotment of Agnes Wolfe, deceased.

That the defendant herein is entitled to have his title quieted against the plaintiff herein for that part of the land described in the plaintiff's petition constituting the Homestead allotment of Agnes Wolfe, deceased.

6. The court further finds that there being no evidence showing whether the cultivated lands upon said allotment *was* located upon that part of the lands designated as a homestead or surplus, the plaintiff should take nothing by reason of his claim for rents, and it is so Ordered.

(See transcript page 45) On the findings of facts and conclusions of law, judgment was rendered in favor of the defendants and against the plaintiff, cancelling of record the conveyances under which plaintiff asserted his title to the land and for possession of the land. (See transcript, page 48).

Motion for new trial was filed and over ruled. (See transcript, page 53).

The case was appealed to the Supreme Court of Oklahoma and the judgment of the trial court was affirmed. (See transcript, page 55).

The plaintiff sued out a writ of error from the Supreme Court of the State of Oklahoma to this court to review and reverse the judgment of the Supreme Court of the State of Oklahoma, the petition for writ of error being shown on page 2 of the transcript.

On page 10 of the transcript will be found the assignment of errors, which are as follows, to-wit:

First. The Supreme Court of the State of Oklahoma erred in its construction of section sixteen of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the Government of the United States, which Treaty was ratified September 25th, 1902, (32 Stat. L. 641), wherein the said Supreme Court of the State of Oklahoma held that where an Indian had selected his "surplus" allotment and afterwards died, that the land in the hands of his heirs was restricted for one, three and five years from the date of patent.

Second. The Supreme Court of the State of Oklahoma erred in holding that the deed made by Wilburn Wolfe to D. R. Johnston was not within the Champerty Statute of the State of Oklahoma.

Third. The Supreme Court of the State of Oklahoma erred in holding that D. R. Johnston had a right to join with him, Wilburn Wolfe, his champertous grantor, and thereby get indirectly what the Champertous Statutes of the State of Oklahoma prohibited getting directly.

Fourth. The Supreme Court of the State of Oklahoma erred in holding that Wilburn Wolfe was entitled to sue for the use and benefit of his champertous grantee, D. R. Johnston, for that, under the Statutes of the State of Oklahoma, the said Wilburn Wolfe had violated the criminal Statutes of the State of Oklahoma by selling the land in controversy while he was out of possession thereof, and while this Plaintiff in Error and his grantors had been in possession thereof for more than one year prior to the making of the conveyance by Wilburn Wolfe to D. R. Johnston.

Fifth. The Supreme Court of the State of Oklahoma erred in refusing to hold that a rule of property had been created as to the class of title acquired by this Plaintiff in Error, for that the testimony showed and the trial court found that the district courts of the State of Oklahoma, United States Court prior to Statehood, Supreme Court of the State of Oklahoma, the lawyers generally in the Chickasaw and and Choctaw Nations, had construed section 16 of the Supplemental Treaty and held that such titles as the one held by this Plaintiff in Error *was* alienable, and that by such constructions for a period of 8 years, $10,000,000.00 had been invested in such Titles.

Sixth. The Supreme Court of the State of Oklahome erred in holding that the deed made by Wilburn Wolfe to A. J. Waldock was void.

For all of which reasons, Plaintiff in Error prays that this cause be reversed and that he have all other relief that he may be entitled.

H. A. LEDBETTER,
Attorney for Plaintiff in Error.

Before proceeding with our argument, we wish to call the courts attention to the fact, that in the trial court, the "homestead" portion of the allotment of Agnes Wolfe, deceased, was also involved but judgment was rendered in favor of plaintiff and no appeal was taken therefrom to the Supreme Court of Oklahoma, and by reason thereof, the "homestead" portion of the allotment of Agnes Wolfe, deceased, is not involved.

We deem it not unwise to make a short statement of the

pertinent facts shown by the record and from which, the law questions arise.

The land in controversy is the "surplus" portion of the allotment of Agnes Wolfe, a full blood Chickasaw Indian, who died on the—day of——, 1903, leaving as her sole and only heir, Wilburn Wolfe, a full blood Chickasaw Indian; that for a consideration of $1050.00, Wilburn Wolfe conveyed by warranty deed, the land in controversy, to A. J. Waldock, as of date October 13th, 1903, which was after the land had been allotted. That by divers conveyances, the title held by Waldock passed to plaintiff, C. E. Gannon, and that plaintiff and his grantors remained in possession these many years, when Wilburn Wolfe executed another deed to the land in controversy, to D. R. Johnston, which was in January 1909; this deed of Johnston's was approved by the County Court of Pontotoc County, Oklahoma, and also by the Secretary of the Interior. The suit was filed in the trial court during the year 1911.

From the foregoing, there is presented to this court six assignment of errors, and the validity of the deed executed by Wilburn Wolfe to A. J. Waldock, dated October 13th, 1903, is presented by our assignment of errors, one, five and six, which are as follows:

> The Supreme Court of the State of Oklahoma erred in its construction of section sixteen of the Supplemental Treaty between the Chickasaw and Choctaw Nations and the Government of the United States, which Treaty was ratified September 25th, 1902, (32 Stat. L. 641), wherein the said Supreme Court of the

State of Oklahoma held that where an Indian had selected his "surplus" allotment and afterwards died, that the land in the hands of his heirs was restricted for one, three and five years from the date of patent.

The Supreme Court of the State of Oklahoma erred in refusing to hold that a rule of property had been created as to the class of title acquired by this Plaintiff in Error, for that the testimony showed and the trial court found that the district courts of the State of Oklahoma, United States Court prior to Statehood, Supreme Court of the State of Oklahoma, the lawyers generally in the Chickasaw and Choctaw Nations, had construed section 16 of the Supplemental Treaty and held that such titles as the one held by this Plaintiff in Error *was* alienable, and that by such constructions for a period of 8 years, $10,000,000.00 had been invested in such Titles.

The Supreme Court of the State of Oklahoma erred in holding that the deed made by Wilburn Wolfe to A. J. Waldock was void.

We will present assignment of errors, one, five and six together, and assignment of errors, two, three and four together:

By section 16 of the Supplemental Treaty, (32 Stat. L. 641), it is said:

"All lands allotted to the members of said tribes, except such land as set aside to each as a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent; PROVIDED, that such land shall not be

alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value."

This court had up for consideration, a deed from a full blood heir where the land was selected by the administrator, in the case of Mullen-Janson vs. United States, 224 U. S. 488 (56 Law Ed. 834) and it was held that the land in the hands of the full blood heir was alienable.

At top of page 839 of the Law Edition, section two, commencing with line 7, Justice Hughes said:

"And the reason may be found in the fact that each member of the tribes, each minor child, as well as each adult, duly enrolled as required, was to have his or her own allotment, so that each member was already provided with a homestead as a part of the allotment, independently of the lands which might be acquired by descent; "Likewise was the allottee provided with his surplus, independently of the lands which might be acquired by descent." (The last quotation is ours). On the other hand, the provision of paragraph 16, which relates to the additional portion of the allotment, or the so-called 'surplus' lands, contains a restriction upon alienation, not only by the allottee, but by his heirs. Whatever may have been the purpose, a distinction was thus made with regard to the disposition by heirs of the homestead and surplus lands respectively."

Justice Hughes in giving his reasons why the inherited portion of the homestead land was alienable, was that the heir was already provided with a homestead, and we add that the heir was already provided with a "surplus." Justice Hughes then says, that for some reason, there was a restriction against the heirs selling the *so-called surplus*, but this restriction is explained away and held to be inapplicable to the "surplus" land in the hands of the heirs, as is shown on page 840, section two, *in re*, Mullen-Janson vs. United States, *supra*, wherein it is said:

> "Whatever the policy of such a distinction, which gives a greater freedom for the disposition by heirs of homestead lands, than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no segregation. It would be manifestly inappropriate to imply the restrictions in such cases, so as to make it applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon a part of them."

The vehicle that carried the land to the heirs in the Mullen-Janson case was Chapter 49 of Mansfield Digest of the Statute of Arkansas through section 22 of the Supplemental Treaty, *supra*. In the case at bar, the land in controversy was inherited by Wilburn Wolfe under the identical statute, that the land was inherited in the Mullen-Janson case, so we may say, that the vehicle that carried the land to the heir, Wilburn Wolfe, can in no way be distinguished from the vehicle that carried the land to the heir in the Mullen-Janson case, *supra*. If there can be no dis-

tinction in the manner of acquiring the estate by the heir, we cannot understand, why the land in the hands of the heir should be restricted in one case and unrestricted in the other. Whether the land was filed upon by an administrator or the Indian himself, the heir takes the land as an inheritance and not as a homestead or surplus. There may be one or more heirs, which heirs may or may not be members of the tribe. Mullen-Janson, *supra*.

Now in the case at bar, Wilburn Wolfe is shown by the record to be duly enrolled as a Chickasaw Indian, and being thus enrolled, he has his own allotment, just as the full blood heir had in the Mullen-Janson case, *supra*, and by reason of which there was no occasion for restricting the land inherited by him from his deceased sister.

The Supreme Court of the State of Oklahoma said that by clear implication, it is shown what Justice Hughes would have said had the Indian died after allotment, and says further that the portion of the opinion by Justice Hughes was purely *dicta*.

It is our contention, that by a clear implication from the proviso of section 16 of the Supplemental Treaty, *supra*, the "surplus" is alienable by the heir before the expiration of the limitation periods of one, three and five years, provided the land is sold for its appraised value.

Note the language of the treaty:

> "Provided that such land shall not be alienable by the allottee or his heirs at any time before the expira-

tion of the Choctaw and Chickasaw tribal governments *for less than the appraised value.*"

The first part of section 16 of the Treaty, *supra*, restricts the individual allottee in his own right, but in the proviso, the heir may sell provided the land is sold for the appraised value. The appraised value of an allotment of land in the Chickasaw and Choctaw Nations is $1041.28, and the consideration for the deed from Wilburn Wolfe to A. J. Waldock is $1050.00, and from which, it will be seen that the land here involved was sold for more than the appraised value.

By the Act of Congress of June 28th, 1898, 30 Stat. 495, section 29 thereof, a scheme was devised for the allotment of the lands of the Chickasaw and Choctaw Indians so as to give to each member so far as possible a fair and equal share thereof, and it is also provided therein that the land of these nations shall be appraised, the language used, being, "That in order to such equal division, the lands of the Choctaws and Chickasaws shall be graded and appraised so as to give to each member, so far as possible, an equal value of the land." And in said Act, it was further provided "That the appraisement and allotment shall be made under the direction of the Secretary of the Interior, and shall begin as soon as the progress of the surveys, now being made by the United States Government, will admit."

Now, under the Act of Congress of May 27th, 1902, 32 Stat. L. 245, the just and reasonable share of each member of the Choctaw and Chickasaw Tribes is declared to be 320 acres, and by the Supplemental Treaty between the Chicka-

saws and Choctaws and the United States (32 Stat. L. 641), section 11 thereof, each member who is living at the date of the ratification of said treaty, was allotted 320 acres of the average allottable land.

In order to carry out this scheme of allotment so that each member thereof might acquire his just and reasonable share of the land, under rules and regulations prescribed by the Secretary of the Interior, the lands of these tribes were classified as to quality, making the highest appraised value of $6.50 per acre and the lowest at twenty-five cents per acre, and by these rules so prescribed by the Secretary of the Interior, the appraised value of an allotment of land in the Chickasaw and Choctaw Nations is $1041.28.

The land so inherited by Wilburn Wolfe having been sold by him to A. J. Waldock for $1050.00, (transcript, page 45, eighth finding of fact), we can but conclude that the deed passed the title to Waldock.

In re, Skelton vs. Dill, 235 U. S. 206, this court had up for consideration, the question whether inherited land by a full blood Creek Indian was alienable, and in the syllabus of the opinion, it said:

> "The restrictions upon alienation by the heirs of an Indian allottee, made by section 16 of the supplemental Creek agreement of June 30th, 1902, (32 Stat. L. 500, chap. 1323) *apply only to allotments made to living citizens in their own right*, and not to allotments made on behalf of deceased persons, under the authority of section 28 of the original agreement

of March 1st, 1901, (31st Stat. at L. 861, chap. 676), or of sections 7 and 8 of the supplemental agreement, in none of which is there any suggestion of a restriction upon alienation."

In the body of the opinion this court in approving the doctrine laid down in the Mullen-Janson case, *supra*, said:

"In Mullen vs. U. S. 224 U. S. 448, a like question arose under the original and supplemental acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to *allotments of living members in their own right*, but not to allotments on behalf of deceased members."

In the case at bar, we are not dealing with an allotment to a living member, but we are dealing with an allotment of a deceased member, and when this court said that the restrictions contained in the treaties had reference to allotments of living members in their own right, we take it that no clearer language could be used to show that the restriction was a personal one, and not a restriction that runs with the land; and when the Indian dies, his restriction dies with him, and the only condition or limitation by which the title conveyed could be defeated, would be, that contained in the priviso of section 16 of the Supplemental Treaty between the Chickasaws and Choctaws and the United States; that is, the land must be sold for its appraised value.

In the Mullen-Janson case, *supra*, this court said some of the heirs may or may not be members of the tribe, and in

the case at bar although the Indian died after having made his selection, the land descended according to Chapter 49 of Mansfield Digest of the Statute of Arkansas, 126 Pac. 723, and this being the same statute that the heirs in the Mullen-Janson case inherited the land, we likewise say that in the case at bar, the heirs may or may not be members of the tribe. It would be indeed a strange construction to place upon the land so inherited, to hold that, although all the heirs acquired the inheritance alike, the heirs who are members of the tribe could not alienate, while the heirs that are not members of the tribe could alienate. We cannot conceive that this court will hold that the restrictions of one, three and five years apply to inherited land, for it can well be implied that these restrictions apply to *living members in their own right*, and not to land inherited under Chapter 49 of Mansfield Digest of the Statute of Arkansas, some of which heirs may or may not be members of the tribe.

In re, Levindale Lead and Zinc Mining Co,, et al vs. Charles Coleman, advance sheet of the Supreme Court of the United States, of July 15th, 1916, is an opinion by this court, where a white citizen of the United States inherited land as an heir of a full blood Osage Indian, and this court held that the restrictions contained in the treaties and Acts of Congress did not apply, holding that the restriction was personal and did not run with the land.

The restriction upon the right to alienate by the Indian is a personal disability similar to that imposed upon a minor. See the following cases: Lowry vs. Weaver 4 Mc-

Lean (U. S.) 457; Stephens vs. Smith 2 Kan. 243, 10 Wall (U. S.) 321; Blue Jacket vs. Johnson County 3 Kan. 300, 5 Wall (U. S.) 737; Scoffins vs. Grandstall 12 Kan. 467; Clark vs. Libby 14 Kan. 435; Clark vs. Akers 16 Kan. 166; Farrington vs. Wilson, 29 Wis. 383.

In the legislation passed by Congress with reference to the Indians, whether it be the members of the Five Civilized Tribes or other Indians, it is the person that is dealt with and not the land.

In re, United States vs. Kagama, 118 U. S. 375, it is said:

> "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never had existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."

And again, *in re* Lone Wolf vs. Hitchcock 187 U. S. 565, it is said:

> "Plenary power over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."

In order to show that Congress has looked upon the question here presented as a personal restriction, and not a

restriction running with the land, we desire to call the courts attention to the subsequent legislation.

Under the Act of Congress of April 21st, 1904, (33 Stat. 189) it is provided:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations that he may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee."

In the first instance Congress realized that the Indian citizen not of Indian blood ought to be permitted to sell his "surplus" allotment and in the second instance, if the Indian citizen of blood could show that he was competent to manage and control his affairs, he could have his restrictions removed.

In other words, Congress was removing the restrictions from the person and not from the land.

If our position herein contended for is incorrect, then the restrictions contained in section 16 of the Supplemental Treaty, of one, three and five years remained in all the instances mentioned in the Act of Congress of April 21st, 1904, *supra*.

Under the Act of Congress of April 26th, 1906, (34 Stat. 137) section 19 thereof, it is provided as follows:

> "That no full blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes shall have power to alienate, sell dispose of or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress, and etc."

Congress here again is legislating with reference to the person and not the land, realizing that a mistake had been made in permitting the full blood Indian allottee to sell.

And by section 22 of the act of Congress of April 26th, 1906, *supra*, it is provided:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; . . . All conveyances made by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, etc."

Congress says that death shall operate to remove the restrictions as to those heirs that may be white and also mixed blood, and as to the full blood heir, his conveyance shall be approved by the Secretary of the Interior. Congress did not say that the heirs could sell, after the time limit of one, three and five years contained in section 16 of

the supplemental treaty, *supra*, had expired, and if our position here contended for is incorrect, all those conveyances made by the heirs under section 22 of the Act of Congress of April 26th, 1906, *supra*, before the expiration of the time limit contained in the supplemental treaty of 1902, *supra*, are void.

We venture the assertion that ninety-nine per cent of the Indians, whose restrictions were removed under the Acts of Congress of April 21st, 1904, and April 26th, 1906, *supra*, conveyed their land prior to the expiration of the one, three and five years limitation contained in the supplemental treaty, *supra*.

In re, Frame vs. Bivens, 189 Fed. 785, the question arose, as to whether the land could be conveyed by a white member of the tribe after the passage of the Act of Congress of April 21st, 1904, and prior to the expiration of the one, three and five years limitation contained in the supplemental treaty, *supra*, and the court held that the Indian could sell.

The next legislation by Congress with reference to the members of the Five Civilized Tribes is that of May 27th 1908, (35 Stat. 312) section one thereof, and from which it will be seen that the restrictions upon the right to alienate, were removed as to those whom Congress thought capable of handling their own affairs.

This court has said in at least three cases:

> "That when several acts of Congress are passed, touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject."

See Cope vs. Cope, 137 U. S. 682; United States vs. Freeman, 3 How. 566, and Tiger vs. Western Investment Co., 221 U. S. 286.

We can but feel that a consideration of section 16 of the supplemental treaty, *supra*, and of the subsequent legislation in *pari materia* therewith, as referred to herein, clearly demonstrates that the restrictions contained in section 16 of the supplemental treaty is personal and not a restriction running with the land.

We can but feel that our position herein contended for is the correct one, for by parity of reasoning, following the Mullen-Janson case *supra*, no good and valid reason exists for restricting the inherited land, but, if by a technical construction it be held that the restrictions of one, three and five years is the restriction, and not the land should be sold for the appraised value, then we submit, that by the act of Congress of April 26th, 1906, 34 Stat. L. 144, chapter 1896, wherein it is said:

> "Provided further that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to selection of allotment, and subsequent to removal of restrictions where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to the issuing and recording or delivery of patent."

The restriction contended for by the defendants is that the "surplus" was inalienable, because the patent had not been issued five years when Wilburn Wolfe conveyed to A. J. Waldock. If this be the restriction, by the act of Congress *supra*, the deed from Wilburn Wofe to A. J. Waldock was validated. The death of Agnes Wolfe removed the

restriction as to the heir, Wilburn Wolfe, so far as the land involved in this suit, and Congress removed the restrictions as to the five year limitation.

In the Mullen-Janson case *supra*, it was contended by the Government that the deed made by the full blood heir was invalid by reason of the fact that it was executed prior to the expiration of the limitation period contained in the supplemental treaty, and this court applied the curative statute *supra*, and held that although there may have been a limitation of five years before the heir could sell, the statute *supra*, validated the deed.

We feel that it will be somewhat burdensome to this court to go further into this question, but the record disclosing that there is another good and sufficient reason why the title of plaintiff in error should be upheld, we desire to call the courts attention to the thirteenth and fourteenth findings of fact by the trial court, as is shown on page 46 of the transcript. By these findings of fact, it is shown that for a period of eight years, such a title as the one here involved was upheld by both the bench and the bar for a period of eight years, and that by reason of which the farmer and investor had invested in such titles approximately $10,000,000.00.

Mr. Chief Justice Marshall said, in 5 Cranch, page 32 (3 L. Ed. 25):

> "Were this act of 1715 now, for the first time to be construed, the opinion of this court would certainly be that the deed was not regularly proved. A justice of the Supreme Court would not be deemed to be a justice of the county, and the decision would be that the deed was not properly proved, and therefore not regularly recorded. But, in construing the statutes

of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the Supreme Court as within the description of the act. It is of some weight that this deed was acknowledged by the Chief Justice who certainly must have been acquainted with the construction given the act, and that the acknowledgment was taken before another judge of the supreme court. *It is also recollected that the gentlemen of the bar who supported the conveyance, spoke positively as to the universal understanding of the state on this point, and that those who controverted the usage on other points, did not controvert it on this. But what is decisive with the court is that the judge who presides in the circuit court for the district of Pennsylvania reports to us that this construction was universally received."*

If what the gentlemen of the bar of this country thought was the law, (using the language of Chief Justice Marshall) and the local courts of the country had said it to be the law, and by reason of which $10,000,000.00 had been invested in such titles as the one here involved, it would appear to us to be the duty of this court, on the principle of *stare decisis*, to adhere to such universal construction by the bench and bar, without regard to how it might be inclined to decide if the question was a new one; for when parties have acted upon such decisions and constructions and rights have been vested thereunder, their inherit correctness or incorrectness in the abstract, are of less importance than that the rule of property so established be constant and invariable.

Following the doctrine laid down by Chief Justice Marshall, see the following cases: 12 Wheaton 168; 6 Peters 296; 4 Howard 51; 14 Howard 504; 18 Wall. 82; Butcher vs. R. R. Co. 125 U. S. 525; Burgess vs. Seligman 107 U. S. 20; 76 Fed. 727; 40 Fed. 677; 46 Fed. 623; 44 Fed. 450; 8 Fed. 887.

We come now to assignment of errors 2, 3 and 4, which are as follows:

> The Supreme Court of the State of Oklahoma erred in holding that the deed made by Wilburn Wolfe to D. R. Johnston was not within the Champerty Statute of the State of Oklahoma.
>
> The Supreme Court of the State of Oklahoma erred in holding that D. R. Johnston had a right to join with him, Wilburn Wolfe, his champertous grantor, and thereby get indirectly what the Champertous Statutes of the State of Oklahoma prohibited getting directly.
>
> The Supreme Court of the State of Oklahoma erred in holding that Wilburn Wolfe was entitled to sue for the use and benefit of his champertous grantee, D. R. Johnston, for that, under the Statutes of the State of Oklahoma, the said Wilburn Wolfe had violated the criminal Statutes of the State of Oklahoma by selling the land in controversy while he was out of possession thereof, and while this Plaintiff in Error and his grantors had been in possession thereof for more than one year prior to the making of the conveyance by Wilburn Wolfe to D. R. Johnston.

We submit that the deed, from Wilburn Wolfe to D. R. Johnston, is violative of the Champerty and Maintenance

Statutes of the State of Oklahoma, as has been held in a long line of cases from the Supreme Court of Oklahoma, which are as follows, to-wit: Houston vs. Scott, 94 Pac. 512; Powers vs. Van Dyke 111 Pac. 939; Martin vs. Cox 122 Pac. 511; Miller vs. Fryer 128 Pac. 713; Vaughn vs. Holder 137 Pac. 672; Phillips vs. Byrd 143 Pac. 684; Sims vs. Brown 149 Pac. 876; Hill vs. Moore 149 Pac. 211; Chilton vs. Dietrich 148 Pac. 1045; Bell vs. Cook 192 Fed. 597.

In the Bell-Cook case supra, the Federal Court for the Eastern District of Oklahoma said that by the long continued adjudication of the Champerty and Maintenance Statute of Oklahoma, a rule of property had been created.

It may be said by defendant that the Champerty and Maintenance Statute of Oklahoma, is local, and by reason of which, this court will not review the decision of the Supreme Court of Oklahoma, wherein it held that the champertous grantor could sue for the use and benefit of his champertous grantee, but we maintain that in-as-much as the record before this court, discloses that the champertous grantor, Wilburn Wolfe is a full blood Chickasaw Indian, that we have a right to challenge the jurisdiction of the trial court in permitting Wilburn Wolfe to sue in his own name, unaided by the Government of the United States or some of its representatives, and having a right to challenge the jurisdiction of the trial court, this would of necessity involve the jurisdiction of the Supreme Court of Oklahoma, by reason of the fact that if the full blood Indian is incapacitated to sue in his own name, any judgment that may have been rendered against him in the trial court as well as such judgment rendered against him in the state

supreme court would not prevent the United States from subsequently suing, not only to cancel the conveyance sought to be cancelled by the Indian in the first instance, but the judgments in the trial court as well as the judgment of the supreme court of Oklahoma.

In other words, it is our contention, that when the pleadings and the evidence disclose that the party suing is an Indian of the full blood class, and is seeking to cancel conveyances made by him while he was restricted, the jurisdiction of the court is ousted, for that the full blood Indian is a ward of the National Government, and unless the suit is brought by the gurdian, the National Government or some of its agents or representatives, the ward is incapacitated to sue to cancel the conveyances made in violation of the restrictions contained in the Treaties and Acts of Congress.

We wish to call the courts attention to 35 Stat. 312, Bledsoe on Indian Land, Second Edition, section 751, wherein, it is said:

> "Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, *including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove clouds therefrom, or clear title to the same*, in cases where deeds, leases or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary

expenses incurred in so doing to be defrayed from the money appropriated by this act."

By section 6 of the Act of Congress of May 27th, 1908, Bledsoe's Indian Lands Laws, *supra*, provision is made for the appointment of representatives by the Secretary of the Interior, whose duty it is, to counsel and advise all the Indians of the restricted class as to their rights as to conveyances made by such restricted Indians, and under this act, these representatives report their findings to the Secretary of the Interior, and in this section of the Act of Congress, *supra*, it is provided:

> "And at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other incumbrance of any kind or character, made or attempted to be made or executed in violation of this act or any other act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands."

Congress, in its wisdom, realized that the full blood Indian would make sales of their restricted land, and in order to prevent its wards from doing indirectly what is prohibited from being done directly, it provided how and in what manner suits to cancel conveyances made in violation of the Treaties and Acts of Congress should be filed.

No where in the record, is it shown that the suit here is brought upon the recommendation of the Secretary of the Interior as is provided by the Act of Congress *supra*, and no where in the record is it shown that the suit was brought by the representative appointed by the Secretary of the Interior as is provided by the Act of Congress, *supra*.

We therefore conclude that the suit here filed, is one that raises the question of jurisdiction in the first instance.

It is an axiomatic proposition, that the right to sue, gives the person suing a right to compromise, but in this case, it will not be contended by the defendant, that Wilburn Wolfe could have agreed to a judgment validating the deed given A. J. Waldock, and we therefore say, that if the Indian of the restricted class, could not validate his deed by agreed judgment, his capacity to sue is wanting.

In the case of Bowling vs. United States, 233 U. S., page 528, the facts were about as follows: A restricted Indian executed a contract of sale for land inherited by him to a white man, and thereafter, the white man refused to pay and the Indian filed suit in his own name for a specifi performance, judgment was entered decreeing a specific performance, and thereafter, a deed was executed by the Indian to the white man, and thereafter 20 odd transfers were made of the title thus acquired by the judgment of the United States Court.

At a subsequent time, the United States filed its suit, seeking to cancel not only the various transfers affecting the title to the land, but to cancel the judgment of the United States court, and the defendants relied upon the former judgment, as an adjudication of their title. The

Supreme Court held, that in-as-much as, the United States was not a party to the suit when the Indian filed the suit, the judgment was not a bar to the right of the United States to maintain the suit, and the judgment first rendered as well as all the transfers were cancelled as a cloud on the title of the restricted Indian.

Let us suppose, that in the case at bar, Wilburn Wolfe had failed to prove his case, and judgment had been entered in favor of the plaintiff. The question is, would the judgment as entered, be an adjudication of the matters and things complained of, to such an extent that the United States would thereby be precluded from suing to cancel the conveyances sought to be cancelled in the suit at bar? Under the authority cited above, the answer is, no.

In the case of Goodrum vs. Buffalo, 162 Fed. 817, 89 C. C. A. 525, it is said:

> "If the Indian could create no estoppel against himself by deed of conveyance, how could he create an estoppel, by consenting to a judgment as the basis of an estoppel, effectual to alienate the land in direct contravention of the Act of Congress. The allottees of these lands during the probationery period of 25 years were under as much disability to alienate them by contract, or deed *or voluntary submission to a court*, as if they had been under the disability of coverature or minority. The disability of the minor to do these things is imposed by the common law. The disability of these Indians is imposed by statute. It must therefore necessarily and logically follow that the record and judgment of the court disclosing on their face that the disqualified Indian was entering into an agreement for submission of the questions

of his right to dispose of these lands, was in no wise different from such a proceeding participated in by a minor infant. It is a wholesome rule of law that a party may not accomplish by indirection that which he could not do directly. *That which Goodrum undertook to do by stipulation with this Indian could not become the subject of a controversy to be submitted to the jurisdiction of the United States Court, so as to build a foundation to support the plea of the res adjudicata.*"

The right to maintain suits of the character of the one at bar, has always been recognized to be in the United States, as was held in the case of Heckman-Owen vs. United States, 224 U. S. 413, and the judgment entered where the United States brings the suit is a bar to a subsequent suit by the Indian, but in the case at bar in the event of an adverse judgment to the Indian, such a judgment is not a bar.

In the case at bar, the plaintiff is placed in a peculiar attitude. Had they won in the trial court, their judgment would have been of no effect, for the United States could have maintained suit to cancel, not only the deed executed by Wilburn Wolfe, but the judgment of the trial court as well.

It would have been a case of "heads I win, tails you lose."

It would be making a play-house out of the court house.

In the case of Bell vs. Fitzpatrick, 157 Pac. 336, not yet reported, is an elaborate discussion of the effect of judgments entered as to restricted Indian land, where the

theory advanced here is sustained, and we respectfully call the court's attention to the same.

We submit that this cause should be reversed.

Respectfully submitted,

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and
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and
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IN THE

SUPREME COURT OF THE UNITED STATES

C. E. Gannon,
Plaintiff in Error,
vs.
D. R. Johnston and Wilburn Wolfe,
Defendants in Error.

No. 470

BRIEF OF DEFENDANTS IN ERROR.

In this case the plaintiff in error, C. E. Gannon, appeals to this Court from a decision of the Supreme Court of the State of Oklahoma adjudging D. R. Johnston to be the owner of and entitled to the possession of 137.78 acres of land located in Jefferson County, Oklahoma, and described in the brief of the plaintiff in error, the lands in controversy having been allotted by Agnes Wolfe, a full-blood Chickasaw Indian, during her lifetime, and having been conveyed by Wilburn Wolfe to D. R. Johnston on the 4th day of January, 1909, which deed was duly approved by the County Court of Pontotoc County, Oklahoma, on March 23rd, 1909, said court having jurisdic-

tion of the settlement of the estate of Agnes Wolfe, deceased, and thereafter by the Secretary of the Interior.

It being admitted by all parties to this action that Wilburn Wolfe is the sole and only heir at law of Agnes Wolfe, deceased, and that he is a full-blood Chickasaw Indian. That the plaintiff in error claims title to the lands in controversy by reason of a deed having been executed on October 13th, 1903, by Wilburn Wolfe to A. J. Waldock, and that Waldock conveyed the land to other parties and that the same was finally conveyed to the plaintiff in error. It being admitted that the conveyance by Wilburn Wolfe to Waldock, through whom the plaintiff in error deraigns his title, was long prior to the time the patent to said lands was issued and signed by the Governors of the Chickasaw and Choctaw Nations and approved by the Secretary of the Interior, the same having been approved by the Secretary of the Interior on October 7th, 1905. It being admitted by the parties to this action that the lands in controversy constitute the surplus part of the allotment of the allottee Agnes Wolfe, deceased.

The Supreme Court of the State of Oklahoma, in an opinion rendered February 3rd, 1914, affirmed the judgment of the District Court of Jefferson County, Oklahoma, adjudging the defendant in error D. R. Johnston to have the legal title to the lands in controversy under his deed duly approved by the court having jurisdiction of the settlement of the estate of Agnes Wolfe, deceased, and holding that the deed and title of the plaintiff in error was void for the reason the lands were restricted at the time Wilburn Wolfe attempted to convey the same to A. J. Waldock, through whom the plaintiff in error claims title.

ARGUMENT.

For a correct decision of the case at bar it is necessary that the following sections, Nos. 11, 12, 14, 15 and 16, of the Supplemental Agreement between the United States and the Choctaw and Chickasaw Indians approved July 1st, 1902 (32 Stat. L. 641), be directed to the Court's attention, and said sections are as follows:

Sec. 11. "There shall be allotted to each member of the Choctaw and Chickasaw Tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred twenty acres of the average allottable land of the Choctaw and Chickasaw Nations, and to each Choctaw and Chickasaw Freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allotable land of the Choctaw and Chickasaw Nations; to conform, as nearly as may be, to the areas and boundaries established by the Government Survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty acre or quarter-quarter subdivisions established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section."

Sec. 12. "Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of

the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the life time of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"The allotment of each Choctaw and Chickasaw Freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

Sec. 14. "When the allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any thre be, shall be sold at public auction under the rules and regulations and on terms to be prescribed by the Secretary, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribe."

Sec. 15. "Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided."

Sec. 16. "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the

balance in five years; in each case from date of patent; provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw Tribal Governments for less than its appraised value."

It is the contention of the defendants in error that, under Sections 15 and 16 of the Supplemental Agreement as above set out, lands allotted by members of the Chickasaw Tribe of Indians during the life time of the allottee were inalienable except as in the act therein provided, and that a deed executed by a full-blood Indian heir to this class of land was absolutely void and conveyed no title to such land, unless conveyed as prescribed in the Act. In the case at bar there is not the slightest contention made that at the time Wilburn Wolfe, the full-blood Indian heir, executed the conveyance to the lands in controversy to A. J. Waldock that said deed was executed in accordance with the provisions of Section 16 of the statute in question, which provided that one-fourth of the surplus lands allotted by a member of the tribe could be conveyed one year from date of patent, one-fourth in three years, and the balance in five years; and the proviso contained in Section 16 prohibited the allottee or the heirs from conveying said lands during the existence of the Choctaw and Chickasaw Tribal Government for less than its appraised value.

It it clear from a reading of Sections 15 and 16 of the Supplemental Agreement that Congress intended that lands allotted to members of the Indian tribes under the agreement should be inalienable excpt the sale be made in the manner provided in the Act, and it necessarily follows

that where no provision was made or way prescribed in the Act for the sale of the allotted lands that the same were inalienable, and while the homestead part of the allotment in the case at bar is not before the court for decision we submit that no provision having been made in the Act for the sale of the homestead until subsequent Acts of Congress that the homestead was also inalienable, as well as the surplus lands, in October, 1903.

Section 15 says "nor shall said lands be sold except as herein provided." Expressio unius exclusio alternus. Congress herein provided the means and manner of sale of the surplus lands and by express prohibition in the Act of 1902 prohibits any other sale. And treaties and laws enacted with reference to the property of Indians shall be construed in their favor and any attempt to deprive them of their property in any other way than that prescribed by law is in contravention of the public policy of Congress and is a void act or deed.

Authorities.

Worcester vs. Georgia, 3 Pet. 515.
U. S. vs. Choctaw Nation, 119 U. S. 1.
Jones vs. Meehan, 175 U. S. 1.
U. S. vs. Winana, 198 U. S. 371.
U. S. vs. Celestine, 215 U. S. 278.

The contention relied upon by the plaintiff in error in this cause that the restriction upon alienaation of the so-called surplus lands contained in Sections 15 and 16 of the Supplemental Agreement as herein set out is a personal restriction and not one which runs with the land, we respectfully submit is no longer an open question in this Court. In the case of Bowling et al. vs. The United

States, 223 U. S. 528, 34 Sup. Ct. Rep. 659, there was construed the Act of March 2nd, 1889 (25 Stat. at L. 1013, chap. 422), which insofar as the question here involved is concerned is substantially the same as said Sections 15 and 16, being as follows:

> "The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation or forfeiture for a like perior of years. As soon as all the allotments or selections shall have been made as herein provided, the Secretary of the Interior shall cause a patent to issue to each and every person so entitled, for his or her allotment, and such patent shall recite in the body thereof that the land therein described and conveyed shall not be alienated for twenty-five years from the date of said patent, and shall also recite that such land so allotted and patented is not subject to levy, sale, taxation or forfeiture for a like period of years, and that any contract of agreement to sell or convey such land or allotments so patented, entered into before the expiration of such term of years, shall be absolutely null and void."

Section 15 of the Supplemental Agreement, supra, reads as follows:

"Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt or obligation of any character contracted prior to the time at which said land may be alienated under this Act, nor shall said lands be sold except as herein provided."

Said Section 16 reads as follows:

"All lands allotted to the members of said tribes, ex-

cept such land as is set aside to each as a homestead as herein provided, shall be alienable after issuance of patent, as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent; provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw Tribal Governments for less than its appraised value."

In Bowling vs. United States, supra, the heirs of the Indian allottee entered into a contract to sell the land before the expiration of the twenty-five years. A suit was brought in the United States Court for the Northern District of the Indian Territory for the purpose of enforcing said contract and a judgment was entered sustaining its validity. Afterwards the United States instituted an action to cancel the conveyance executed by the heirs in pursuance to said judgment, and also to set aside said judgment. It was the contention in that case, as it is in this, that the restriction was a personal one, and did not run with the land. This Court, through Mr. Justice Hughes, said:

> "The question, then, is whether the restriction imposed by the Act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land, binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to 'the lifetime of the allottee,' as in Mullen vs. United States, 224 U. S. 448, 453, 56 L. Ed. 834, 839, 32 Sup. Ct. Rep. 494, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that 'the land so allotted' should not be subject to alienation for

twenty-five years from the date of patent. 'Said lands so allotted and patented' were to be exempt 'from levy, sale, taxation or forfeiture for a like period of years.' The patent was to expressly set forth that 'the land therein described and conveyed' should not be alienated during this period, and all contracts 'to sell or convey such land' which should be entered into 'before the expiration of said term of years' were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or his heirs. Moreover, the subsequent legislation, relating to the same subject matter, which expressly provided for conveyances by heirs of allottees, subject to the approval of the Secretary of the Interior, leaves no room for doubt as to the intention of Congress. United States vs. Freeman, 3 How. 556, 564, 11 L. Ed. 724, 727; Cope vs. Cope, 137 U. S. 682, 688, 34 L. Ed. 832, 834, 11 Sup. Ct. Rep. 222; Marchie Tiger vs. Western Investment Co., 221 U. S. 309, 55 L. Ed. 747, 31 Sup. Ct. Rep. 578."

An examination of the Supplemental Agreement (32 Stat. L. 641), of which said Sections 15 and 16 are parts, will show that other sections thereof contained substantially the same provisions as those quoted in the opinion of this Court relative to exemptions from levy, sale, taxation, forfeiture, and of contracts to sell the same before the expiration of the restricted period. And, furthermore, the subsequent legislation by Congress, as evidenced by the Act of April 26, 1906 (34 Stat. at L. 137), and the Act of May 27, 1908 (35 Stat. at L. 312), leaves no more room for doubt as to the intention of Congress than was left by the subsequent legislation mentioned by this Court in said opinion.

The opinion in Bowlin vs. United States, supra, was handed down May 4, 1914, and this case was decided by the Supreme Court of the State of Oklahoma February 3, 1914 (a re-hearing being denied April 28, 1914).

This question as to the nature of the restriction contained in said Sections 15 and 16 has also been decided adversely to the contention of the plaintiff in error by the District Court of the United States for the Eastern District of Oklahoma, In re Lands of Five Civilized Tribes, 199 Fed. Rep. 811, in which case Judge Campbell said:

> "The restriction imposed by the proviso to Section 16, prohibiting alienation for less than the appraised value, can only become operative as to any particular tract after the expiration of the one-three, or five years restriction, as the case may be. Until that time, no alienation is permitted. Hence, until then, there is no necessity of placing a minimum purchase price upon the same. The parties to the agreement, therefore, must have contemplated that the tribal governments might continue after the expiration of the one, three and five-year periods. The proviso clearly expresses the intention that during such continuance of the tribal governments, after the expiration of the said restriction periods, the further limitation as to the purchase price not being less than the appraised value should affect the lands in the hands of the allottee and his heirs. But, when by alienation it should pass into the hands of third parties, there was then no further duty or desire by the parties to the agreement to control it in any way in the hands of such third parties, even though, as in many instances might be the case, the tribal governments were still in existence. Hence, instead of merely providing in the proviso, as in the former part of the section, that the land should be inalienable for less than the appraised

value until the expiration of the tribal governments, which would have affected it in the hands of third persons as well as in the hands of the allottee or his heirs, the limitation in the proviso specifically mentions the allottee and his heirs as the ones, and the only ones, affected by the limitation. As Sections 15 and 16, construed together, clearly provide that one-fourth of the land, in acreage, allotted to a member, shall not be alienated before the expiration of one year, and one-fourth, in acreage, shall not be alienated before the expiration of three years, and the remainder not before the expiration of five years, in each case from date of patent, and as I do not find that this provision is in any way limited or modified by the proviso relating to sale for less than the appraised value, it is my opinion that, as held in the Buffalo case, supra, the one, three and five years restrictions run with the land, and affect it as well in the hands of the heirs as of the original allottee."

In other words, that while the restriction as to the sale for less than the appraised value, by the allottee or his heirs, before the expiration of the tribal governments, was a personal restriction, the other restriction contained in Sections 15 and 16, when construed together, ran with the land, and neither the allottee, nor his heirs, could dispose of said land, at any price, until after the expiration of the respective periods of one, three and five years.

Counsel for plaintiff in error, in their brief, cite the case of Levindale Lead & Zinc Mining Company et al. vs. Charles Coleman, decided June 5, 1916, 36 Sup. Ct. Rep. 644 (advance sheets), in support of their contention. In that case, the land involved had come into the possession, by inheritance, of a person who was not a member of the tribe, and this Court held that the restriction on

alienation of Osage Indian allotments "do not apply to lands or any interest therein which have come into the possession of a white man not a member of the tribe, under allotments made in the right of certain deceased Indians to their deceased heirs." And in said case this Court used the following language:

> "It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (Bowling vs. United States, 233 U. S. 528, 58 L. Ed. 1080, 34 Sup. Ct. Rep. 659), but restrictions would not run with the land unless they had attached. **And even where they had attached, they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe."**

We respectfully submit that it is readily apparent that the question decided in the case from which we have just quoted is materially different from the one involved in this case, and the decision in that case is not an authority in support of the contention of the plaintiff in error.

The plaintiff in error in his brief says that because the lands in controversy were inherited by the heir under Chapter 49 of Mansfields Digest of the Statute of Arkansas and it being the same vehicle that carried the lands to the heirs in the Mullen-Janson case and there being no distinction in the manner of acquiring the estate by the heirs there is no reason for holding the lands in the case at bar to be restricted. In way of reply to this proposition, we submit that Chapter 49 of Mansfield's Digest of Statutes

f Arkansas has nothing whatever to do with restrictions pon Indian lands. The only effect of the Laws of Arkansas had prior to the admission of Oklahoma to statehood upon the estates of Indians was to define the blood elation or those standing in proper kinship to the deeased that would inherit the estate. Today, under the aws of Oklahoma, the heirs are defined by the Oklahoma tatute, but the right of an Indian to dispose of his inherited lands is prescribed by the laws of Congress, found in the Act of May 27th, 1908, wherein it is provided that full-blood Indian heirs may dispose of their inherited lands where the conveyance is approved by the court having jurisdiction of the settlement of the estate. Now, the same Indian heir who is not a full-blood but inherits his estate under the same law can convey his inherited lands without the approval of the court. But, according to the proposition contended for by counsel for plaintiff in error, the full-blood heir is unrestricted the same as the heir that is not a full-blood, because he comes to his estate by the same law of descent and distribution.

Speaking upon the identical proposition the Supreme Court of Oklahoma, through Chief Justice Kane, in the case of Taylor vs. Parker et al., 33 Okl. 199, said:

> "We do not believe this contention can be sustained. The effect of the Act of April 28, 1904 (33 Stat. at L. 573), was to make the laws of Arkansas, therefore put in force in the Indian Territory, applicable to another class of persons and estates, to-wit, Indians and their property, insofar as it was alienable under the Act of Congress then bearing upon it. The extension of the law of wills enables the Indian to devise all his alienable property by will made in accordance with the laws of the State of Arkansas

but did not operate to remove any of the restrictions heretofore placed upon the lands of Indians by Act of Congress."

Counsel for plaintiff in error almost concede that the lands in controversy were restricted at the time the conveyance was executed through which they deraign title but contend that the same was validated by the Act of Congress of April 26th, 1906 (34 Stat. L. 144, Chapter 1896), wherein they take the following quotation:

> "Provided further that conveyance heretofore made by members of any of the Five Civilized Tribes subsequent to selection of allotment, **and subsequent to removal of restrictions** where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to the issuance and recording or delivery of patent."

But counsel fail to give the additional quotation from the same Act of Congress, which is as follows:

> "But this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided, and every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby declared void."

Now, the deed relied upon by plaintiff in error having been executed before the removal of restrictions from the land is an absolute nullity under the above Act of Congress.

In the case of Marche Tiger vs. Western Investment Co. et al., 221 U. S. 286, 31 Sup. Ct. 578, Mr. Justice Day, speaking for the Court, recognizes a limitation on

alienation by reason of the conveyance being executed prior to the issuance of patent.

As to the second point urged by plaintiff in error, in which he seeks to invoke the champerty statute of Oklahoma, we call attention to the fact that Wilburn Wolfe, the full-blood Indian who, as brother, had inherited from the deceased allottee the land involved in this case, as shown by the record herein, to which attention has been called by the plaintiff in error in his brief, executed his deed of conveyance to said lands to the defendant in error Johnston, which deed was approved by the County Court of Pontotoc County, Oklahoma, in accordance with the terms of Section 9 of the Act of May 27, 1908, and by the Secretary of the Interior, in accordance with Section 22 of the Act of April 26, 1906. All of the authorities upon the subject, including those cited by plaintiff in error in his brief, are to the effect that event though it be admitted that a deed is executed in violation of the champerty statute, it is a binding instrument as between the parties thereof. After the execution, approval and delivery of said conveyance to the defendant in error there were no longer any restrictions of any character upon the alienation of said lands. Wilburn Wolfe had parted with his title in accordance with the provisions of the law. This being true, what interest could the United States possibly have in the matter of the suit by the grantee of said Wilburn Wolfe to recover the lands theretofore attempted to be conveyed by Wolfe to plaintiff in error by means of a void deed? We respectfully submit that the contention is obviously frivolous.

Moreover, we submit that the champerty statute of the State of Oklahoma has no application to the convey-

ance executed by Wilburn Wolfe to the defendant in error. This has been so held by the Supreme Court of the State of Oklahoma in the case of Ashton vs. Noble, 148 Pac. 1042. We quote from the syllabus in that case as follows:

> "The statutes of the state, intended to prevent champerty and maintenance, and the state adjudications, rendering inoperative a deed by a grantor out of possession, as against the adverse holder of the land, are inapplicable, inoperative and ineffective, as against a sale of and a deed to restricted Indian lands made in conformity to the laws of the United States, by and through its chosen governmental agencies.

But the position of the plaintiff in error is untenable in this case for the further reason the grantor of Waldock through whom the plaintiff in error claims title was made a party plaintiff although, under the above decision, supra, he was an unnecessary party, and the procedure of making him a party is supported by the following authorities:

60 Ind. 478.
96 N. W. 258.
37 N. Y. 502.
18 S. W. 251.
19 Ga. 594.
99 Ala. 125.
25 Fla. 853.
114 Mass. 140.

And the second proposition of the plaintiff in error cannot be sustained for the reason that title to lands based upon an absolutely void deed executed in violation of an express prohibition of Congress is not color of title and does not convey any right or claim upon which an estoppel or adverse possession may be sustained.

Authorities.

Taylor vs. Brown, 40 N. W. 525, affirmed in 147 U. S.
Smith vs. Henry, 41 Fed. 705.
Shelton vs. Donohoe (Kan.), 19 Pac. 901.
Clark vs. Akers, 16 Kan. 166.
22 Cyc. 136.
Goodrum vs. Buffalo, 162 Fed. 817, 89 C. C.
Schrimpscher vs. Stockton, 183 U. S. 290, 46.

The third contention of the plaintiff in error is that a rule of property was established because it was an universal opinion of the bar, on the east side of the State of Oklahoma, and of the trial court, that the lands in controversy were alienable at the time the plaintiff in error purchased same.

But we respectfully submit that in order to raise an erroneous decision to the dignity of law and to establish a rule of property it must be a decision of a court of last resort, and in the case at bar there is not even any claim made that any investment was made by honest capital and by honest investors based upon the decision of any appellant court, construing the law applicable to the lands in controversy, and every decision upon the subject says that such a decision, even of a court of last resort, may be reversed where no injurious results are likely to flow therefrom, and surely it could not be said that any serious injury would result in announcing the plain meaning of an Act of Congress made for the specific purpose of protecting full-blood Indians in their property rights. The rule of property is an equitable rule, under which honest men have expended their money upon the assumption that a court of last resort has established their title, and should be invoked only to protect the investment of honest capital.

To say that it may be based upon the bias opinions of lawyers, biased by personal interest, or those of their clients and invoked to protect a class of men who accumu-

late fortunes by taking advantage of full-blood Indians and whose transactions will not bear the light of an investigation by the Department of the Interior or a court of competent jurisdiction, is to deprive courts and legislatures of their functions and to leave the weak and those needing the protection of the court at the mercy of any class of persons who may be influential enough to warp legislative enactments and judicial decisions to suit their own personal interest, but we know of no rule of law where a rule of property may be built up in the face of a plain statute and where there is a governmental policy involved.

Authorities.

American Mortgage Co. vs. Hopper, 64 Fed. 553.
Ocean Beach Assoc. vs. Brinkley, 34 N. J. L. 438.
189 Ill. 439.
59 N. E. 977.
11 Cyc. 756.

We respectfully submit that the decision of the Supreme Court of Oklahoma herein is supported by the decisions of this Court and the plain provisions of the Supplemental Treaty of 1902, and should be affirmed.

Respectfully submitted,

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